IN THE HIGH COURT OF JUSTICE **Claim No. AC-2023-LON-003634**

ADMINISTRATIVE COURT (KBD)

B E T W E E N:

THE KING

On the application of

AL-HAQ

Claimant

-and-

SECRETARY OF STATE FOR BUSINESS AND TRADE

Defendant

-and-

(1) OXFAM

(2) AMNESTY INTERNATIONAL

(3) HUMAN RIGHTS WATCH

Interveners

CLAIMANT'S SKELETON ARGUMENT

References: *are in the form [CB/A/1/1] (i.e. Core Bundle, Section A, Tab 1, Page 1)*

I. INTRODUCTION

1. On 2 September 2024, as part of the **September Decision**,[1] the Defendant (the "**SSBT**") concluded that:

1.1. Israel is not committed to complying with international humanitarian law ("**IHL**") in the current conflict in Gaza; and

1.2. there is a clear risk that any military item exported from the United Kingdom to Israel might be used by Israel to commit or facilitate a serious violation of international humanitarian law in Gaza.

2. On the basis of those conclusions, the SSBT decided to suspend export licenses for items that might be used in carrying out or facilitating Israel's military operations in the current conflict (the "**Suspension Decision**") [CB/C].

3. Despite this, the UK continues to export military equipment to Israel. It does so in the form of components used in the manufacture and maintenance of F-35 planes ("**F-35s**") which are transferred from the UK to Israel indirectly.

4. F-35s have been described as "*the most lethal fighter jets in the world*".[2] As described more fully at Andrews-Briscoe 2 [CB/D/27/568-580], and summarised further below, they have been utilised extensively by Israel in its ongoing attacks in Gaza, having been modified by Israel to carry and drop very large ordnance.

[1] The term 'September Decision' is used compendiously to refer to the overall decision taken by the SSBT on 2 September 2024 in relation to arms exports to Israel. Constituent elements of the September Decision include the Suspension Decision and the F-35 Carve Out, as defined in paragraphs 2 and 5 respectively.
[2] Air Force, Joint Direct Attack Munition GBU-31/32/38 fact sheet: https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104572/ [SB/F/177/2783-2786].

5. The SSBT decided to exclude licenses for the export of F-35 parts from his Suspension Decision (the "**F-35 Carve Out**"). In so doing, the SSBT departed from Criterion 2(c) of the Strategic Export Licensing Criteria (the "**SELC**"), made pursuant to s.9 of the Export Control Act 2002 (the "**2002 Act**"). The SSBT departed from Criterion 2(c) of the SELC because of his assessment, made in light of advice from the Secretary of State for Defence, that:

> […] suspending F-35 licences is likely to cause significant disruption to the F-35 programme, which would have a critical impact on international peace and security, including NATO's defence and deterrence.[3]

6. The Claimant challenges the lawfulness of the F-35 Carve Out on five grounds.

7. **First**, the SSBT erred (i) in assessing that continued exports of military equipment would be compatible with Criterion 1 of the SELC, which requires "*respect for the UK's international obligations and relevant commitments*", whether or not there were grounds for suspension by reference to Criterion 2(c); and (ii) in his self-direction that the F-35 Carve Out was "*consistent with the UK's* […] *international law obligations*". In reaching those conclusions, the SSBT misunderstood and misapplied Common Article 1 of the Geneva Convention ("**CA1**"); Articles 6(2)/(3) and/or 7(3) of the Arms Trade Treaty (the "**ATT**"); Article I of the Genocide Convention, and rules of customary international law reflected in Articles 16 and 41 of the Articles on State Responsibility ("**ASR**"). These errors are the subject of Ground 8[4] below.

8. **Secondly**, the SSBT erred in his conclusion that the F-35 Carve Out is "*consistent with the UK's domestic law* […] *obligations*". It was not, because it breached three customary international law obligations which have been (or should be) received into the common law or are essentially reflected in it. This error is the subject of Ground 9.

9. **Thirdly**, the F-35 Carve Out is ultra vires the SSBT's powers under the 2002 Act because it gives rise to a significant risk of facilitating crime. This error is the subject of Ground 10.

[3] Letter from the Defendant's Principal Private Secretary to the SSFCDA's Private Secretary (Exhibit RP2-6) [CB/C/18/284].

[4] The Claimant's grounds of challenge begin with Ground 8 because 7 grounds relating to three earlier licensing decisions taken between October 2023 and September 2024 were not permitted to proceed: see ¶¶63-67 below.

10. **Fourthly**, the F-35 Carve Out is irrational (as a matter of process rationality) because the reasoning relied upon in support of it suffers from a *"logical error or critical gap"*[5]. This error is the subject of Ground 11.

11. **Fifthly**, the SSBT erred in his approach to the assessment of whether there was a "*good reason*" to depart from his published policy. In particular, in balancing the risks of continuing to export F-35 parts against the risks of suspending those exports, the SSBT unreasonably limited his consideration of the former to the existence of a "*clear risk*" of unspecified "*serious violations*" of IHL — without making any attempt to assess the nature, extent or potential gravity of these risks (the exercise referred to as "*calibration*"), whilst adopting a different approach in relation to his consideration of the latter (by calibrating the risks of suspension). This error is the subject of Ground 12.

12. The Claimant also challenges a further decision made by the SSBT on 2 September 2024, namely his decision not to suspend other licenses for use by the Israeli army. In making that decision, the SSBT failed to have regard to obviously relevant considerations. This error is the subject of Ground 13 below.

13. The remainder of this skeleton argument is structured as follows:

13.1. Section II sets out the factual background to this claim.

13.2. Section III sets out the procedural background.

13.3. Section IV sets out the domestic legal framework for this challenge.

13.4. Section V sets out the international legal framework for this challenge.

13.5. The Claimant's Grounds are addressed in Sections VI-XI.

13.6. A short conclusion appears at Section XII.

II. FACTUAL BACKGROUND

14. Israel's assault on Gaza is "*a moral stain on the conscience of our collective humanity*".[6] In just over 18 months, Israel has decimated an entire society. The Israeli army has

[5] *R (KP) v SSFCDA* [2025] EWHC 370 (Admin) (at ¶56).
[6] The United Nations Deputy Emergency Relief Coordinator in Gaza, "Opening Remarks at the Ninth Conference on Effective Partnership for Better Humanitarian Aid," 12 May 2024, available here : https://www.un.org/unispal/document/asg-13may24/.

committed genocide, war crimes and crimes against humanity against the population in Gaza. It has deliberately targeted women and children, United Nations ("**UN**") staff, aid workers, doctors, nurses, teachers, ambulance drivers, and rescue workers. It has attacked and destroyed hospitals, schools, universities, water sanitation plants and bakeries. It has detonated and desecrated mosques and churches. It has committed acts of torture, rape and summary execution. It has detained tens of thousands of Palestinians without trial or charge, starving them and subjecting them to the most horrific abuse. It has subjected the entire population of Gaza to famine-like conditions, starving them, cutting off water, electricity and basic services, and preventing the entry of life-sustaining aid, shelter and medical supplies. And it has done so while keeping the bombed and besieged, men, women and children trapped in a piece of land no larger than the Isle of Wight; "*Gaza is* […] *sealed off like a cage*".[7]

15. Much of this it has done openly. Israel's political and military leaders have celebrated the destruction of Gaza and its people; its soldiers have openly recorded and broadcast their crimes; its officials are now calling for the "*voluntary emigration*" of Palestinians from their homeland, having reduced that homeland to a postapocalyptic wasteland.[8]

16. That Israel has acted in this way is demonstrable and incontrovertible. What is happening in Gaza is a live-streamed genocide. What Al-Haq relies upon, however, in these proceedings are primarily the documents that the SSBT and those advising him themselves chose to consider in taking the repeated decisions to continue supplying weapons to Israel, including the decision under challenge to continue supplying F-35 parts to Israel indirectly.

17. What follows, therefore, is not Al-Haq's own account of Israel's attack on Gaza, but an account taken in large part from the work of civil servants tasked by the Secretary of State for Foreign and Commonwealth Affairs ("**SSFCDA**") with compiling and assessing evidence of Israel's actions. It is supplemented by Al-Haq's corroborating witness evidence and findings from international bodies. The evidence referred to in this section was available to the SSBT at the time of the decision under challenge, save only

[7] The United Nations Relief and Works Agency, *UNRWA Commissioner-General: "As if death, diseases, destruction and hunger were not enough for the Palestinians in Gaza,"* 31 March 2025, available here: https://www.unrwa.org/newsroom/official-statements/unrwa-commissioner-general-if-death-diseases-destruction-and-hunger.

[8] See Tables of Statements of Israeli government and military personnel at Exhibit DM4-15 [SB/F/156/2356-2439] DM4-16 [SB/F/157/2440-2453] and DM 5-1 [SB/F/163/2556-2568].

for the strike on 18 March 2025 at ¶52.2 and the subsection headed 'developments post-dating September 2024' at ¶¶55 to 57.

A. ISRAEL AND THE OCCUPIED PALESTINIAN TERRITORY

18. The Gaza Strip is home to approximately 2.2 million Palestinians, over half of whom are children. It is one of the most densely populated areas in the world. Around two thirds of the people in Gaza are themselves refugees or the descendants of the approximately 750,000 Palestinians who were forced from their homes in towns and villages of what is now the territory of the State of Israel on the formation of the State in 1948, in what Palestinians call the "Nakba" or "catastrophe".[9] Israel continues to deny them the right to return to their homes, as guaranteed under international law, and as confirmed in multiple UN resolutions.

19. Israel has been in belligerent occupation of the occupied Palestinian Territory ("**oPT**"), consisting of the West Bank, including East Jerusalem, and Gaza for 58 years, since 1967. As confirmed by the ICJ in its July 2024 Advisory Opinion, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (*"**oPT Second Advisory Opinion**"*), Israel's continued presence in the oPT is illegal, in serious violation of international law, and constitutes a serious breach of the fundamental right of the Palestinian people to self-determination.[10]

B. ISRAEL'S CONDUCT OF HOSTILITIES IN GAZA SINCE 7 OCTOBER 2023

(i) Killings, deaths, injuries, and displacement

20. The last assessment placed before the SSBT prior to the decision under challenge (to continue supplying F-35 parts to Israel in September 2024) noted that *"according to the Hamas-run Ministry of Health in Gaza (MoHG), there were 37,396 fatalities (32% of those identified were children), 85,523 reported injuries, and more than 10,000 people missing since the start of the conflict."*[11] A previous assessment before the SSBT had

[9] Alayyan 1 ¶138 [SB/C/17/310-311]; Third IHLCAP Assessment, 30 November 2023 ¶6 ('Out of Cycle Assessment'), [SB/E/49/665]; for the "Nakba", see footnote 1 to Evidence Base 1 of 7 October 2023 to 3 November 2023 (Exhibit CH2-7A) [SB/E/41/563].
[10] International Court of Justice, Advisory Opinion on the Legal Consequences arising from the Policies and Practice of Israel in the Occupied Palestinian Territory, including East Jerusalem, 19 July 2024, ¶261-264.
[11] 7th IHLCAP assessment, 24 July 2024 ¶25 [CB/E/41/696].

further explained that the "*MoHG's data is widely believed to be accurate, including by the Israeli government.*"[12]

21. Even these figures were likely to have been a gross underestimation, and that was known to the SSBT at the time. The evidence before the SSBT was that "*all evidence points to the death toll from the conflict in Gaza being much higher than the official reported figures, even including those who are confirmed as missing*."[13]

22. It is impossible to assess the true number of dead in Gaza due to, *inter alia:* (a) the destruction of Gaza's healthcare and mortuary system;[14] (b) the tens of thousands of people trapped under rubble or unidentified in mass graves;[15] and (c) the hundreds of thousands of indirect deaths estimated to have been caused by lack of access to routine medical care, the creation of famine conditions, the siege of the civilian population and destruction of civilian infrastructure necessary for life. In April 2024, UNRWA was already calling this a war "*of superlatives*"[16] and UN Secretary General Antonio Guterres stated that "*in its speed, scale and inhumane ferocity, the war in Gaza is the deadliest of conflicts — for civilians, for workers, for journalists, for health workers and for our own colleagues.*"[17]

23. Further, at the time of the decision under challenge, according to the IHL Compliance Assessment Process assessment ("**IHLCAP**") Cell (explained below at ¶72), 1.7 million Gazans had been displaced; this amounted to *"around 75% of Gaza's population."*[18] The SSBT was aware that this was in large part a consequence of numerous large scale evacuation orders issued by Israel, which forced the civilian population of Gaza to flee their homes.[19] The IHLCAP notes, for example, that by 25 May 2024 *"BCG* [British Consulate General] *Jerusalem reported* [that]*... close to a million people have been*

[12] Evidence Base 5 of 16 December 2023 to 13 January 2024 (Exhibit CH2-7E), ¶8 [SB/E/64/824-825].
[13] Ibid.
[14] Minogue 4 ¶52 [CB/D/22/329-330].
[15] Ibid, ¶8 [CB/D/22/301-303] and ¶10 [CB/D/22/304].
[16] UNRWA on X, dated 2 April 2024, available here: https://x.com/UNRWA/status/1775158002405761135.
[17] UN, 'Secretary-General Brief Press on Situation in Gaza as Six Months Passes of Conflict', 5 April 2024, available here: https://media.un.org/photo/en/asset/oun7/oun71032729.
[18] 7th IHLCAP Assessment, 24 July 2024, ¶27 [CB/E/41/697].
[19] See for example 7th IHLCAP Assessment of 24 July 2024, ¶¶27, 103 [CB/E/41/697, 719]; Evidence Base 1 of 7 October to 3 November 2023 (Exhibit CH2-7A). ¶72 [SB/E/41/568]; Evidence Base 2 of 4 to 17 November (Exhibit CH2-7B), ¶9 [SB/E/41/609]; Out of Cycle Assessment, 30 November 2023 (Exhibit CH2-8), ¶32 [SB/E/49/672]; Evidence Base 4 of 2 to 15 December (Exhibit CH2-7D) [SB/E/56/792]; Evidence Base 5 of 16 December 2024 to 13 January 2024 (Exhibit CH2-7E) [SB/E/64/830]; Evidence Base 6 of 14 to 28 January 2024 (Exhibit CH2-7D) ¶25 [SB/E/66/861]; Updates to Foreign Secretary December 2023 to May 2024 (Exhibit CH2-9) [SB/E/89/1111].

evacuated, some moving to designated 'humanitarian zones' where they face an absence of water, food and shelter."[20]

(ii) Use of airstrikes targeting of civilians

24. Two features of Israel's assaults on Gaza account, in particular, for the high number of Palestinians killed. **Firstly**, the use of airstrikes in densely populated areas.[21] The Israeli army claimed they had carried out 10,000 airstrikes within the first two months of their assault on Gaza;[22] by May 2024, the SSBT was aware that the *"tempo of killings"* was *"so overwhelming"* that OHCHR was unable to produce daily reporting.[23] **Secondly**, the intentional targeting of the civilian population. This is just one of the crimes for which the International Criminal Court ("**ICC**") has now issued arrest warrants against the Israeli Prime Minister and former Minister of Defence. The SSBT was advised by his officials at the time of his decision that an independent panel of legal experts, having reviewed the ICC Prosecutor's evidence, had concluded unanimously that the offences were '*systematic*'.[24] The SSBT's own evidence base recorded the targeted killings of people waving white flags,[25] civilians attempting to access aid, civilians on humanitarian routes,[26] and civilians who remain in evacuations zones.[27] The UN Commission of Inquiry ("**COI**") also concluded that the Israeli army had "*intentionally direct*[ed] *attacks against the civilian population or against individual civilians not taking direct part in hostilities*".[28]

[20] 7th IHLCAP Assessment, 24 July 2024, (Annex 11 Information Store 25 April - 19 June 2024 'Information Store 25 April - 19 June 2024'), ¶48 [CB/E/51/832]
[21] Ibid, ¶¶25-32 [SB/E/51/854-855]
[22] 7th IHLCAP Assessment, 24 July 2024 ¶85(d) [CB/E/41/713].
[23] 7th IHLCAP Assessment, 24 July 2024, (Annex 11 'Information Store 25 April - 19 June 2024'), ¶25 [CB/E/51/854].
[24] 7th IHLCAP Assessment, 24 July 2024 ¶ 78 [CB/E/41/710].
[25] Evidence Base 6 of 14 January 2024 to 28 January 2024 (Exhibit CH2-7F) [SB/E/66/885]; CIR Fortnightly Incident Reports (Exhibit CH2-4), IPIN 261, IPIN348, IPIN 797 [SB/E/99/1179, 1193, 1220]; Summary of Fortnightly Reports (Exhibit CH2-5), IPIN 797 [SB/E/100/1387].
[26] CIR Fortnightly Incident Reports (Exhibit CH2-4) IPIN 797 [SB/E/99/1220] Summary of Fortnightly Reports (Exhibit CH2-5), IPIN 006 [SB/E/100/1323].
[27] Evidence Base 2 of 4 November 2023 to 17 November 2023 (Exhibit CH2-7B)¶19 [SB/E/45/611], Minogue 4 ¶77-78 [CB/D/22/338-339] describes Israeli military accounts of kill zones established in evacuated areas, see also ¶365 [CB/D/22/462-463] which sets out the killing of Israeli hostages because of the area in which they were seen; The Israeli army has explicitly stated in a mass evacuation order that those who remain in evacuation zones may be considered participants in a terror organisation.
[28] UN COI, 'Detailed findings on the military operations and attacks carried out in the Occupied Palestinian Territory from 7 October to 31 December 2023' 10 June 2024, (A/HRC/56/CRP.4) ¶420, available here: https://www.un.org/unispal/document/coi-report-detailed-findings-on-military-operations-in-opt-10jun24/.

25. The Claimant had likewise adduced extensive evidence of Israel's indiscriminate and disproportionate use of airstrikes including first hand witness accounts.[29] By way of example, one witness, a volunteer ambulance driver at Nasser Hospital stated that he had been present in the aftermath of a bombardment which killed more than 300 people.[30] Another witness, a Civil Defence worker, explained that "*[we] have not been able to keep up with the rate at which bodies are building up.*"[31]

26. Dr. Amer Shoaib, a Consultant at Manchester Royal Infirmary, volunteering in Gaza, attended to a mass casualty incident following Israel's airstrikes on a UN truck outside of a school sheltering displaced Palestinians.[32] He and other doctors in a registered safehouse were also themselves targeted in a missile attack, about which he made numerous attempts to engage the UK Government.[33] Dr. Nicholas Maynard, a Consultant at Oxford University Hospital, was in Nasser hospital when Israel conducted an airstrike on the ICU.[34] Dr. Mohammad Subeh, an Emergency Physician in California, said *"missiles cause the biggest destruction. We would get up to 70 patients coming in at once…".*[35] As to the deliberate targeting of non-combatants, one of Al-Haq's witnesses, a journalist, testified that he was shot at by a tank whilst wearing his helmet and shield marked *"press."* He had to have his leg amputated and is no longer able to work as a journalist.[36] Hundreds of journalists have been killed by Israel in Gaza.[37]

(iii) Israel's targeting of essential infrastructure

27. On 25 April 2024, the OPT Protection Cluster Coordinator briefed UK officials that they were seeing the *"absolute systematic destruction of the fabric of life in Gaza"*[38] . By the time the SSBT made the decision in September 2024 to continue the indirect supply of F-35 parts to Israel, he was aware that:

[29] Such evidence had been provided to the Defendant in the course of these proceedings in August 2024.
[30] Al Asttal [SB/C/20/352].
[31] Ashour ¶ 4-5 [SB/C/23/377-378].
[32] Shoaib ¶6 [SB/C/33/457].
[33] Shoaib ¶9 [SB/C/33/458].
[34] Maynard ¶7 [SB/C/35/475-476].
[35] Subeh ¶ 10 [SB/C/28/408].
[36] Shahdha ¶2 [SB/C/25/391].
[37] DM4 ¶ 367-388 [CB/D/22/463-471].
[38] 7th IHLCAP Assessment, 24 July 2024, (Annex 11 'Information Store 25 April - 19 June 2024'), ¶25 [CB/E/51/827].

27.1. Israel had destroyed all of Gaza's universities[39]; and had damaged or destroyed 90% of schools;[40]

27.2. Israel had damaged or destroyed numerous sites of cultural heritage and importance, such as museums, religious sites, including mosques, churches and monasteries, archaeological sites, cemeteries and libraries;[41]

27.3. Israel had destroyed a large number of Gaza hospitals, such that as of 19 June 2024 there were no fully functioning hospitals in Gaza, those that were partially functional faced severe shortages, and most hospitals had ceased providing essential services.[42] As of 5 June 2024, most hospitals had ceased providing maternity care, in particular, despite an average of 180 women giving birth each day;[43]

27.4. On 7 May 2024, UN High Commissioner for Human Rights Volker Türk briefed the UNSC that *"the pattern of attacks striking hospitals is emblematic of violations by Israeli forces of the principles of distinction, proportionality and precautions. By progressively attacking, destroying and seriously damaging all major hospitals in Gaza from the north to the south, and by impeding emergency transportation, evacuation of the wounded and the entry of critical medical supplies, the Israeli Forces have effectively destroyed Gaza's health care system"*;[44]

27.5. There were *"systematic and widespread"* attacks on civilian housing and infrastructure, which the UN's Special Rapporteur on the right to adequate housing had described as *"domicide"*[45]. The 'buffer zone' being cleared by the Israeli army around Gaza's perimeter was essentially a *"land grab"* taking 16% of Gaza's land.[46]

[39] Ibid, ¶44 [CB/E/51/830].
[40] Ibid.
[41] Ibid.
[42] Ibid ¶47 [CB/E/51/ 858].
[43] 7th IHLCAP Assessment, 24 July 2024, ¶105 [CB/E/41/719].
[44] 7th IHLCAP Assessment, 24 July 2024, (Annex 11 'Information Store 25 April - 19 June 2024') ¶34 [CB/E/51/828].
[45] 7th IHLCAP Assessment, 24 July 2024, ¶26 [CB/E/51/827].
[46] Ibid. Note that by October 2024 Forensic Architecture estimated Israel's land grab at 36% of Gaza (DM5 ¶19) [CB/D/25/543-544].

27.6. Israel was "*targeting*" agricultural land,[47] "*razing*" entire agricultural areas[48] and demolishing agricultural buildings;[49]

27.7. There had been "*substantial damage*" to water and sanitation infrastructure, and as of 15 January 2024 there was only one water pipeline that remained operational[50]; Israel had refused UNICEF's requests to rebuild wells and blocked the entry of materials to repair the water network[51]; concerns about public health were already increasing in January 2024 due to the "*very limited*" water, sanitation, food and shelter[52]; and as of 28 May 2024, many Palestinians were surviving on less than 3% of their daily water needs.[53]

(iv) Starvation, obstruction of humanitarian aid, and targeting of humanitarian workers

28. On the evidence considered by those advising the SSBT and accepted as the basis for his decisions, as of 25 June 2024 the situation in Gaza remained "*catastrophic*" with all of the Strip then categorised by the Famine Review Committee as being in a state of "*emergency*" (Phase 4) and with a "*high risk of famine*" (Phase 5 which corresponds to "*extreme lack of food; starvation; death"*) across the whole of Gaza.[54] More than 50,000 children were estimated to require treatment for acute malnutrition in 2024.[55]

29. Although SSBT's officials found that they "*did not have enough information*" to make an assessment of whether Israel used starvation as a method of warfare[56], they recorded the unanimous conclusion of an independent panel of legal experts, who reviewed the ICC Prosecutor's evidence, that the offence was '*systematic'*[57], and a report by the UK network for organisations working in international development's which found that

[47] Centre for Information Resilience Fortnightly Incident Reports (Exhibit CH2-4) [SB/E/99/1204].
[48] Evidence Base 5 of 16 December 2023 to 13 January 2024 ¶ 109 (Exhibit CH2-7E) [SB/E/64/852].
[49] Centre for Information Resilience Fortnightly Incident Reports, 2 December 2023 - 5 June 2024 (Exhibit CH2-4) [SB/E/99/1209], (Exhibit CH2-4) [SB/E/99/1231], Table Summary of CIR and ad hoc reports (Exhibit CH2-6) [SB/E/104/1432].
[50] Evidence Base 6 of 14 to 28 January 2024, 28 January 2024 (CH2-7F) [SB/E/66/862].
[51] Ibid [SB/E/66/863].
[52] Evidence Base 5 of 16 December 2023 to 13 January 2024, 13 January 2024 (CH2-7E) [SB/E/64/824].
[53] 7th IHLCAP Assessment, 24 July 2024 (Annex 11 'Information Store 25 April - 19 June 2024'), ¶47 [CB/E/51/831].
[51] 7th IHLCAP Assessment, 24 July 2024 [CB/E/41/719]; see also 7th IHLCAP Assessment, 24 July 2024 (Annex 11 'Information Store 25 April to 19 June 2024') [CB/E/51/831] which records the director of the UN World Food Programme as saying that hard-hit northern Gaza was now in 'full-blown famine', which was 'moving its way south', with 1.1 million people facing 'catastrophic hunger'.
[55] 7th IHLCAP Assessment , 24 July 2024 [CB/E/41/718].
[56] Ibid [CB/E/41/728].
[57] Ibid [CB/E/41/710].

Israel's restrictions on aid were "*deliberate, systematic and intentional*"[58]. The UN COI, considering both Israel's siege and evidence as to its obstruction of humanitarian access, also concluded that Israel was using starvation as a method of warfare.[59]

30. The evidence considered by those advising the SSBT on which his decision was premised included the following: (1) FCDO officials had been briefed that there was a "*pattern*" of Israeli attacks on aid deliveries[60] ; (2) the humanitarian response was "*on the verge of collapse*"[61], the UN and NGOs were "*close to breaking point*"[62]; (3) UNRWA was systematically denied access to the north of Gaza[63], and the UN and NGOs told UK officials they believed Israel was enacting a *"wider (and deliberate) plan to effectively empty the strip of international staff"*[64].

31. As to targeting of humanitarian workers, the evidence before the SSBT was that: (1) at least 273 aid workers had been killed, including 197 UN staff[65]; (2) the widely acknowledged problems with the deconfliction system were *"not technical, but a 'problem of will' and a 'problem of commitment to IHL'"*[66]*;* (3) in a period of two weeks the UN had recorded 10 incidents involving shooting at convoys.[67]

(v) Effects on children

32. UNICEF has described Israel's military activities in Gaza as "*a war on children*".[68] As set out above, the SSBT was aware by the time of making the decision to continue the indirect supply of F-35 parts to Israel in September 2024, that Israel has killed more than 11,900 children and injured many more in Gaza[69].

33. The evidence considered by those advising the SSBT on the basis of which his decision was made included the following:

[58] 7th IHLCAP Assessment, 24 July 2024 (Annex 11 'Information Store 25 April to 19 June 2024') ¶52 [CB/E/51/833].
[59] UNHCR'S COI, "Detailed findings on the military operations and attacks carried out in the oPT from 7 October to31 December 2023," A/HRC/56/CRP.4, 10 June 2024 ¶448-451
[60] 7th IHLCAP Assessment, 24 July 2024 (Annex 11 'Information Store 25 April to 19 June 2024') [CB/E/51/829, 834, 835].
[61] 7th IHLCAP Assessment, 24 July 2024 (Annex 11 'Information Store 25 April to 19 June 2024') [CB/E/51/833].
[62] Ibid. [CB/E/51/836].
[63] Ibid. ¶55 [CB/E/51/834].
[64] Ibid. ¶55 [CB/E/51/836].
[65] Ibid. ¶43 [CB/E/51/829].
[66] 7th IHLCAP Assessment, 24 July 2024, ¶58 [CB/E/41/705].
[67] 7th IHLCAP Assessment, 24 July 2024 (Annex 11 'Information Store 25 April to 19 June 2024') ¶55 [CB/E/51/834].
[68] https://www.unicef.ch/en/current/statements/2024-01-18/gaza-war-war-against-children quote from Jan 2024
[69] 32% of 37,396 is 11,9667: 7th IHLCAP assessment, 24 July 2024 ¶25 [CB/E/41/696].

33.1. The UK was briefed by the UN on 7 June 2024 that approximately 117 children were killed every day, that over 70,000 children were unaccompanied and that children in Gaza now represented the largest group of amputee children in the world.[70] (The February 2024 Evidence Base had earlier recorded a report by Save the Children that, since the start of the conflict, about 1,000 children in Gaza had lost one or both of their legs, many having had them amputated without anaesthetic, and would require a lifetime of medical care).[71]

33.2. FCDO officials were briefed on 25 April 2024 by the OPT Protection Cluster Coordinator that they were seeing *"the use of airborne ammunition, with wide impact in densely populated areas, killing a high percentage of children and women."*[72]

33.3. Children had been killed in attacks on designated 'safe zones.'[73]

33.4. Children had been tortured and treated inhumanely in detention, including having been beaten beyond recognition as briefed to FCDO officials.[74]

33.5. The bodies of children had been found in mass graves.[75]

34. At the time of the decision, the Claimant had also submitted extensive evidence to the Defendant of the harm suffered by children. For example, Dr. Mark Perlmutter, an American orthopaedic surgeon volunteering Gaza, stated "*I saw more incinerated and shredded children than I had ever seen in my entire life of working in war zones combined*"; "*I treated so many children that had been snipered, some of them twice*"; "*these two children were shot so perfectly in the chest that I couldn't have put my stethoscope over their hearts more accurately*"; "*[Another] three-year old girl…had been shot in the head and in the neck*."[76] Dr Muhammed Subeh, also an American doctor, estimated that 60% of those he treated in Gaza were children.[77]

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[70] 7th IHLCAP Assessment, 24 July 2024 (Annex 11 'Information Store 25 April to 19 June 2024') [CB/E/51/830].
[71] Evidence Base 5 of 16 December 2023 to 13 January 2024 ¶27 (Exhibit CH2-7E) [SB/E/64/831].
[72] 7th IHLCAP Assessment, 24 July 2024 (Annex 11 'Information Store 25 April to 19 June 2024') [CB/E/51/827]
[73] Ibid.
[74] Ibid. [CB/E/51/842]; see also summary of Save the Children report by IHLCAP of 3 March 24 (Exhibit CH2-34) [SB/E/74/925-948], supported by the BOND IOPT working group briefing to FCDO officials CIR evidence base 1 March – 24 April, ¶70-71 [SB/E/85/1051]
[75] Centre for Information Resilience (CIR) Fortnightly Incidents Report 2 December 2023 to 5 June 2024 [SB/E/99/1225, 1228, 1230]; See also case report for Al Shifa Hospital (Exhibit DM4-4) [SB/F/145/2048].
[76] Perlmutter ¶¶8-9 [SB/C/34/472]
[77] Subeh at ¶3 [SB/C/28/406].

(vi) Torture

35. There have been consistent reports of widespread and systematic use of torture against Palestinian detainees. The evidence considered by those advising the SSBT on the basis of which his decision was made included the following:

35.1. Widespread allegations of torture by Israeli officials of Palestinian detainees made following their release: *"based on the testimonies the groups [Addameer, Al Mezan, Al-Haq and the PCHR] reported that the torture inflicted on Gaza detainees has reached unprecedented levels."*[78]

35.2. Multiple allegations that doctors had been detained and tortured including for example a doctor who had *"been arrested in Gaza after treating a patient, but the seven other medical staff he was with were killed by Israeli forces…he described his treatment saying that he had been beaten resulting in broken ribs; had electrical shocks used on him; and they had tried to drown him in water.."*[79] (These gross violations of peremptory norms of international law are classed as *"incidents of mistreatment"* in the assessments.)[80]

35.3. Multiple accounts of Palestinian deaths in custody as a result of Israeli torture, including for example the death of a 33-year-old prisoner who was assessed by the Director of Al-Najjer Hospital as having died as a result of torture.[81]

35.4. Allegations of widespread rape by Israeli officials of Palestinians in detention,[82] and a persistent and widespread refusal by Israel to allow the ICRC access to detainees.[83]

35.5. With respect to the notorious Israeli military detention camp Sde Teiman, where large number of Palestinians seized from Gaza were taken, there were findings that *"Doctors amputated prisoners' limbs due to injuries sustained from constant handcuffing…[and the Israeli military] did not directly deny accounts of people being stripped of their clothing or held in diapers."*[84] The assessment further notes that, at Sde Teiman, *"More than 1000 suspected 'unlawful combatants' from Gaza*

[78] 7th IHLCAP Assessment, 24 July 2024 (Annex 11 'Information Store 25 April to 19 June 2024') [CB/E/51/841]
[79] 7th IHLCAP Assessment, 24 July 2024 (Annex 11 'Information Store 25 April to 19 June 2024') [CB/E/51/841]
[80] Ibid.
[81] Ibid.
[82] Ibid. [CB/E/51/842]
[83] Ibid.
[84] Ibid.

have been detained in cage-like enclosures surrounded by barbed wire. Mounting testimonies have exposed 'unimaginable abuses.'"[85]

36. Representative of international bodies were specifically engaging with the UK Government in relation to these issues, and FCDO officials assessed their evidence as credible:

36.1. *"On 30 April, UNRWA CG Philippe Lazzarini briefed UKMis [the UK Mission to] Geneva that UNRWA had issued a report on those released from Israeli detention which detailed more than 1000 accounts of shocking treatment. Gazans of all ages were rounded up in trucks, stripped and blindfolded. In some cases they were attacked by dogs and forced to wear nappies. UNRWA staff had been subjected to such treatment and forced by Israeli interrogators to 'admit' that they were affiliated with Hamas and had participated in the terrorist attacks of 7 October."*[86]

36.2. *"On 7 May, UN High Commissioner for Human Rights Volker Türk briefed the UNSC that thousands of Palestinians in Gaza 'have been arbitrarily detained, often incommunicado, in conditions that may amount to enforced disappearance. Several released detainees have alleged torture and other ill-treatment, including sexual violence. Some of them are children — boys as young as nine years old'."*[87]

36.3. *"In mid-May, FCDO officials received information that released detainees, had made credible claims of disappearances, mistreatment, torture, and instances of sexual violence. <u>They assessed the situation to be deliberate and instruction-based: in their opinion, the ministers in charge of detention had instructed staff to worsen the conditions in which people were held."</u>*[88] (emphasis added.)

37. The Defendant's own evidence accords with evidence that was adduced by the Claimant in these proceedings in advance of the decision under challenge. One witness, an ambulance driver (above), was detained for two months and tortured, *"beaten every day and was suspended from* [his] *arms and feet in the ceiling."*[89] An anonymous medical professional was also detained and tortured so severely that he lost his right eye and his

[85] Ibid.
[86] 7th IHLCAP Assessment, 24 July 2024 (Annex 11 'Information Store 25 April to 19 June 2024') [CB/E/51/842].
[87] Ibid.
[88] Ibid.
[89] Al Asttal, ¶14 [SB/C/20/354].

leg is now paralysed.[90] He was forced to wear a 'nappy' and shackled to the bed by all four limbs.[91] The wife of Dr. Iyad Al Rantisi, testified to her husband's seizure by Israeli forces as they tried to adhere to an evacuation order and passed through the Netzarim Checkpoint. Dr. Rantisi died in detention a week after his arrest, though his wife found out from the media eight months later.[92]

38. Similarly, Dr Khaled Dawas,[93] Dr Ben Thomson,[94] Dr Nicholas Maynard,[95] and Dr Mark Perlmutter[96] — all international doctors who volunteered on medical missions to Gaza — provided accounts of treating patients whose injuries were consistent with their accounts of torture. A number of these witnesses reported treating patients for injuries that resulted from handcuffs being too tight[97] and, for example, Dr. Thomson reported treating a Palestinian paediatrician who had been tortured by Israeli soldiers in front of his (child) patients.[98]

C. STATEMENTS OF ISRAELI OFFICIALS

39. Senior Israeli political and military officials have consistently made statements which illustrate genocidal intent, intent to harm Palestinians, and disdain for compliance with international law. These include statements dehumanising Palestinians and asserting that there are no innocent persons or civilians in Gaza (generating consent for the targeting and killing of *all* Palestinians); the use of the biblical language of Amalek, understood as calling for the obliteration of the Palestinian people as a group;[99] extensive calls to wipe out Gaza and to remove Palestinians to allow for resettlement of Gaza, at whatever cost; opposition to proportionality, necessity or compliance with international law in attacks on Gaza; and disregard for international law generally. The SSBT had a number of these statements before him in the form of a "Public Statement

[90] Anonymous Medical Professional, ¶13 [SB/C/29/414].
[91] Ibid. ¶12.[SB/C/29/413].
[92] Al Hams ¶1-7 [SB/C/26/397-398].
[93] Dawas ¶¶10-11 [SB/C/31/425].
[94] Thomson ¶¶4-7 [SB/C/27/404].
[95] Maynard ¶9 [SB/C/35/476].
[96] Perlmutter ¶7 [SB/C/34/472].
[97] Dawas at ¶ 10 [SB/C/31/425] ,Thomson at ¶4 [SB/C/27/404].
[98] Thomson ¶3-4 [SB/C/27/403-404].
[99] See B'Tselem, *Manufacturing Famine: Israel is Committing the War Crime of Starvation in the Gaza Strip* (April 2024), https://www.btselem.org/publications/202404_manufacturing_famine: "*Remember what Amalek did to you."* That is what Binyamin Netanyahu wrote in a message to Israeli soldiers on 3 November 2023, in a dog whistle that anyone who has gone through Israel's education system will recognize as meaning a response to an attack in a way that would obliterate any memory of that nation, women and children included. When the fight against Hamas is compared to the war against Amalek, the conclusion is clear: The order is to wipe out Gaza."

List" produced and maintained by CIR for the period 28 October 2023 to 5 June 2024[100], and in the evidence bases produced by IHLCAP Cell. Thus, *from these assessments alone* the SSBT was aware of such statements, including:

39.1. the Israeli Defence Minister's claim to have "*released all restraints*" on military activities, and reference to Palestinians in Gaza as "*human animals*";[101]

39.2. the Israeli Prime Minister's invocation of Amalek — stating "*we remember and we fight*" — in describing Israel's conduct of hostilities in Gaza;[102] his goal of "*ensuring that Gaza does not pose any threat*";[103] and his repeated statements opposing international legal limits, including: "*the International Court of Justice will not stop us from waging war on Gaza*";[104] and "*no amount of pressure, no decision by any international forum will stop Israel from defending itself"*;[105]

39.3. declarations by Members of the Security Cabinet — through which decisions regarding governmental policy in Gaza was made — that "*Gazans are not innocent*";[106] that "*we need to establish a Jewish settlement in Gaza*" instead of the "*2 million Nazis there*";[107] that "*we must destroy Rafah, Nusseirat, and Deir al-Balah, wipe out the memory of Amalek. There's no half-measure.* […] *absolute destruction*";[108] that Israel must "*stop the transfer of humanitarian aid to Gaza*";[109] and that "*we cannot have women and children getting close to the border... anyone who gets near must get a bullet*";[110]

39.4. calls by ministers and parliamentarians, including in the ruling coalition, for "*settlement in the Gaza Strip*";[111] and — in relation to humanitarian aid provided to Palestinians — for "*an immediate stop to the entry of trucks transporting fuel, gas and additional equipment to the enemy in the Gaza Strip*";[112] "*no water, no food, no*

[100] CIR Fortnightly Incident Report 2 December 2023 to 5 June 2024 (Exhibit CH2-4) [SB/E/99/1243-1321].
[101] 2nd IHLCAP Assessment 4 -17 November 2023, 20 November 2023 (Exhibit CH2-17 ¶25) [SB/E/46/638].
[102] CIR Fortnightly Incident Report 2 December 2023 to 5 June 2024 (Exhibit CH2-4 PD0327) [SB/E/99/1243].
[103] Ibid. (Exhibit CH2-4 PD0280) [SB/E/99/1267] (emphasis added).
[104] Ibid. (Exhibit CH2-4 PD0207) [SB/E/99/1260].
[105] Ibid. (Exhibit CH2-4 PD0621] [SB/E/99/1307].
[106] Ibid. (Exhibit CH2-4 PD0123) [SB/E/99/1252].
[107] Ibid. (Exhibit CH2-4 PD0198)[SB/E/99/1256].
[108] Ibid. (Exhibit CH2-4 PD0604) [SB/E/99/1305].
[109] Ibid. (Exhibit CH2-4 PD0323) [SB/E/99/1272].
[110] Ibid. (Exhibit CH2-4 PD0330) [SB/E/99/1272].
[111] Ibid. See e.g. (Exhibit CH2-4) [SB/E/99/1247-1248, 1259].
[112] Ibid. (Exhibit CH2-4 PD0174) [SB/E/99/1253].

fuel";[113] and "*the closing of the crossing for trucks transporting food, medicine and more for the residents of Gaza*".[114]

39.5. unchecked public incitement to genocide by political figures including parliamentarians in the Prime Minister's own party, such as calls to "*burn Gaza*";[115] to "*eras[e] the whole area north of our borderline* [...] *completely clean. I don't care who will be there*";[116] that "*Total victory is to destroy the entire area now. It's either them - or us*";[117] to "*attack from the air without mercy!*"[118] and for the "*Nazi settlement[s]*" in Gaza to be "*completely destroyed*";[119] and

39.6. similar statements by commanders of military units in Gaza, including that "*we need to make sure that wherever the IDF meets Gaza there is devastation*" and "*unfortunately I learned that there is no innocence in Gaza*".[120]

40. As a member of the United Nations Security Council, the UK also was provided by South Africa with a detailed 121-page dossier of such statements in May 2024.[121] Despite that being materially relevant to the case, it was not disclosed to the Claimant in these proceedings. A list of statements, made at every level of the Israeli military and political class, is also exhibited at Exhibit DM4-15 [SB/F/156/2356-2349] and Exhibit DM4-16 [SB/F/157/2440-2453]. Those statements were publicly available, and so available to the SSBT when making his decision to continue supplying Israel with F-35 parts. They speak for themselves.

D. SUPPLY OF WEAPONS FROM THE UK TO ISRAEL

41. The UK's supply of weapons to Israel drastically increased following 7 October 2023. In 2023, the F-35 Open General Export Licence (OGEL) was used to export equipment directly to Israel on 14 occasions. That is the highest number of exports of any year since the OGEL was issued in 2016; the next highest year was 5. (This figure does not include any additional exports by the UK to the US of components to build new F-35s

[113] Ibid. (Exhibit CH2-4 PD0242)[SB/E/99/1263].
[114] Ibid. (Exhibit CH2-4 PD0276) [SB/E/99/1266] (emphasis added).
[115] Ibid. (Exhibit CH2-4 PD0002, PD0179) [SB/E/99/1243, 1258].
[116] Ibid. (Exhibit CH2-4 PD0308) [SB/E/99/1269].
[117] Ibid. (Exhibit CH2-4 PD0590) [SB/E/99/1303].
[118] Ibid. (Exhibit CH2-4 PD0649) [SB/E/99/1309].
[119] Ibid. (Exhibit CH2-4 PD0173) [SB/E/99/1257].
[120] Ibid. (Exhibit CH2-4 PD0230) [SB/E/99/1261].
[121] Letter dated 29 May 2024 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council, UN Doc S/2024/419, available here.

for Israel, or exports of spare components to the global stockpiles that were subsequently delivered to Israel.)[122]

42. By 30 August 2024, the FCDO assessed there to be 363 licences for exports of controlled goods to Israel. Of these 36 licences were identified as *"items which could be used for military operations in Gaza."*[123] These included components for fighter aircraft, helicopters and unmanned aerial vehicles known to be used in operations in Gaza, naval systems and targeting equipment, as well as components for transport aircraft which, whilst not operating in Gaza, may facilitate relevant operations.[124] These licences were suspended, save for the 5 relating to F-35 components.[125]

43. The UK currently contributes to Israel's F-35 fleet in two ways.

43.1. **First**, through the manufacture of new F-35s: the UK contributes parts for new aircraft which account for 15% of the value of the end aircraft.[126]

43.2. **Second**, through exports to the Global Spares Pool or to the central production facilities and assembly plants of spare parts for F-35s.

44. Other than the US, the UK is the largest contributor of spare parts for F-35s to Israel.[127] F-35s require a significant degree of maintenance and Israel is heavily reliant on spare parts to prosecute its military campaign in Gaza.[128]

45. Israel is vastly expanding its F-35 fleet. In June 2024, Israel signed a letter of acceptance with the US to buy an additional 25 F-35s, marking a 50% increase.[129] On 13 March 2025, Israel received three new F-35s.[130] Following receipt of these planes, the Israeli Air Force said in a press release that *"[t]he expansion of the* [F-35] *Adir fleet constitutes a significant enhancement of the Israeli Air Force's lethal capabilities."*[131] Given that

[122] Andrews-Briscoe 2 ¶9 [CB/D/27/571], and Campaign Against the Arms Trade F-35 briefing update (CAB2-5) [SB/F/164/2577].
[123] Pratt 2 ¶19 [CB/C/23/526].
[124] Ibid.
[125] Pratt 2 ¶18 [CB/D/23/526].
[126] Detailed advice from the Defence Secretary to the Business and Trade Secretary, and Foreign Secretary, 18 July 2024. (Exhibit RP2-9) [CB/E/30/589].
[127] Andrews-Briscoe 2 ¶27 [CB/D/27/579]
[128] Ibid. ¶19-21 [CB/D/27/576-577].
[129] Ibid. ¶22
[130] Ibid. ¶23
[131] Ibid.

the UK is the sole supplier of certain parts which are critical to the operation of the aircraft, every F-35 delivered to Israel will, by necessity, contain British components.[132]

E. ISRAEL'S USE OF F-35s

46. F-35s are described by their manufacturer as *"the most lethal fighter jet in the world."*[133] Israel has modified its F-35 fleet in order to be able to carry and drop one-ton bombs.[134] Such bombs can be lethal within a 300 metre radius and typically leave a 12 metre wide bomb crater.[135] A UN-appointed commission has previously warned that such bombs can *"rupture lungs and sinuses and tear of people's limbs hundreds of feet from the blast site."*[136]

47. A report dated June 2024 by the UN Office of the High Commissioner for Human Rights found that these bombs have been used in "*emblematic*" cases of indiscriminate and disproportionate attacks by Israel against the civilian population in Gaza. The report concludes that, by using these bombs: *"... the IDF may have repeatedly violated fundamental principles of the laws of war… unlawful targeting when committed as part of a widespread or systematic attack against a civilian population, in line with a State or organisational policy, may also implicate the commission of crimes against humanity."*[137]

48. Israel's use of multi-ton bombs was known to the Defendant at the time of the decision under challenge. The Evidence Base notes: *"There is also reporting of larger 2000lb bombs, for which the use of was analysed [by OCHA OPT] as follows: "'it remains extremely questionable whether a weapon with such a wide impact area allows its operators to adequately distinguish between civilians and civilian objects and the military objective of the attack, when used in densely populated areas. Attacks, which used this type of weapon in densely populated, built-up areas of Gaza, are therefore likely to constitute a violation of the prohibition of indiscriminate attacks.'"* [138]

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[132] Ibid. ¶30 [CB/D/27/580]; Bethell 1, ¶22 [CB/D/26/565-566].
[133] Lockheed Martin, "F-35 Lightning II" (accessed on 20 March 2025), available here: https://www.lockheedmartin.com/en-us/products/f-35.html
[134] Andrews-Briscoe 2 ¶11[CB/D/27/572].
[135] https://danwatch.dk/en/major-civilian-casualties-danish-equipped-fighter-jets-behind-bloody-attack-in-gaza/
[136] Danwatch 'Major civilian casualties: Danish-equipped fighter jets behind bloody attack in Gaza', 1 September 2024 [SB/F/161/2544-2551]
[137] UN OHCHR, "Israeli use of heavy bombs in Gaza raises serious concerns under the laws of war," 19 June 2024, [SB/F/138/1746] available at: https://www.ohchr.org/en/press-releases/2024/06/un-report-israeli-use-heavy-bombs-gaza-raises-serious-concerns-under-laws.
[138] Evidence Base 2 of 4 November to 17 November 2023 (Exhibit CH2-7B) [SB/E/45/615].

49. The 7th IHLCAP assessment further notes that *"On 10 May, the Norwegian Refugee Council (NRC) told Lord Ahmad that they were evacuating their staff from Rafah (as were WFP); the situation had become untenable, with 2000-pound bombs dropped in densely populated areas, killing hundreds each time. Drones allegedly only give one hour's warning that buildings would be destroyed."*[139]

50. By Israel's own account, it is heavily reliant on F-35s to prosecute its military campaign in Gaza. According to the Israeli Air Force, as at March 2025, the F-35 fleet had *"accumulated over 15,000 flight hours across approximately 8,800 sorties throughout the war."*[140] In the same press release, Israel confirmed that it has used F-35s to strike *"in Judea and Samaria* [i.e. the West Bank]."[141] F-35 pilots themselves likewise confirm that *"the [F-35s] are fully involved in the war"*[142] and their squadrons have been working *"around the clock"* and *"non-stop."*[143]

51. Israeli media sources also attest to Israel's extensive reliance on its F-35 fleet: according to an Israeli public broadcast service, *"since the beginning of the war the F-35s took part in hundreds of strikes in Gaza from the north from to the south."*[144]*;* according to Ynet, *"the powerful F-35 jets [have] attacked hundreds of targets, including Hamas tunnels and shafts in the Gaza Strip… the army uses [the F-35] constantly in the Gaza Strip."*[145]

52. It is not generally possible to attribute individual airstrikes to individual types of fighter jets. However, F-35s were found or suspected to have been used in the following specific strikes:[146]

52.1. On 13 July 2024, the Israeli military used an F-35 fighter jet to drop three 2,000lbs bombs on tents sheltering displaced Palestinians in a declared "safe zone" in Al-Mawasi.[147] Israel asserted that the intended target of the strike was Al-Qassam

[139] 7th IHLCAP Assessment, 24 July 2024 ¶ 27 (Annex 11) [CB/E/51/827].
[140] Andrews-Briscoe 2 ¶4 [CB/D/27/569].
[141] Andrews-Briscoe 2 ¶4 [CB/D/27/569].
[142] Minogue 5 ¶26 [CB/D/25/547].
[143] Andrews-Briscoe 2 ¶6 [CB/D/27/570].
[144] Minogue 5 ¶27 [CB/D/25/547].
[145] Andrews-Briscoe 2 ¶6 [CB/D/27/570].
[146] It is not generally possible to attribute individual strikes to F-35s since most modern aircraft can carry a range of munitions and there are no known munitions that can be released *only* by the F-35. (See Andrews-Briscoe 2 ¶26 [CB/D/27/578]. In the Al-Mawasi strike, Israel confirmed in a statement that the F-35 had conducted the strike; in the 18 March strike, the F-35 was visually identified. (See Andrews-Briscoe 2 ¶24-26 [CB/D/27/578].
[147] Minogue 5 ¶25 [CB/D/25/546]; ASFG ¶87 [CB/A/2/57].

Brigades commander Mohammad Deif. The strike killed at least 90 Palestinians and injured over 300 others. Rescue workers who arrived at the scene were also killed by follow-up missile strikes from an Israeli drone.[148]

52.2. On 18 March 2025 (in an incident post-dating the decision under challenge, but nevertheless materially relevant to it), Israel broke the ceasefire with Hamas, killing at least 436 Palestinians, including 183 children in sudden, unannounced strikes across Gaza, as many awoke for the Ramadan pre-fast Sohour meal. This strike was conducted just five days after Israel had received three new F-35s, which as explained above contain British components. Journalist Abubaker Ahmed confirmed that he was able visually to identify F-35s during the attacks, since they were flying so low. He said "*The sky turned red and became heavily shrouded with plumes of smoke… Mothers' wails and children's screams echoed painfully in my ears."*[149]

53. Given Israel's stated extreme reliance on F-35s, it is logical to infer that F-35s were likely to have been used in the above attacks.

54. Further to conducting standalone aerial attacks, Israel uses its F-35s to (i) clear the path for its ground troops and (ii) provide cover for its ground troops. This is confirmed by F-35 pilots who maintain for example: "*we are the pillar of fire* [that gets there] *before the forces arrive;" "[we] provide fire support to the fighting forces;" "we have been working side by side with the ground forces;" "[we] assist the ground forces to attack in Gaza."*[150] As such, in addition to the traumatic deaths, life-changing injuries and widespread destruction of civilian infrastructure that airstrikes themselves cause, the conduct of Israel's ground troops can also be causally linked to its F-35 fleet. Israel's illegal actions towards Palestinians on the ground, and those abducted from Gaza, are facilitated by the use of F-35s.

F. DEVELOPMENTS POST-DATING SEPTEMBER 2024

55. The Claimant has sought to present the facts as they were at September 2024. However, as the Court will be aware, Israel has continued and escalated its attacks on Gaza since September 2024. With respect to the Court, Al Haq only very briefly addresses Israel's

[148] Ibid. ¶30 [CB/D/25/548-550].
[149] Andrews-Briscoe 2 ¶24 [CB/D/27/578].
[150] Ibid. ¶18 [CB/D/27/575-576].

subsequent conduct, in order simply to demonstrate the continuing significance of this challenge. By way only of brief example (in the last six weeks alone):

55.1. On 2 March 2025, Israel again imposed a complete blockade on Gaza. For over a month, no commercial or humanitarian supplies have entered Gaza.[151] This extreme situation has prompted increasingly desperate pleas from international bodies including for example the UN Relief Chief Tom Fletcher who said on 7 April 2025 *"[a]s UN humanitarian leaders we are repeating unequivocally to the world: we are being deliberately blocked from saving lives in Gaza, and so civilians are dying."*[152] The severity of this situation led Foreign Secretary David Lammy to state that *"this is a breach of international law,"* a statement which Downing Street later sought to retract.[153] There is every indication that this blockade will continue: on 8 April 2025, Israel's Finance Minister vowed that *"not even a grain of wheat will enter Gaza."*[154]

55.2. As above, Israel broke the ceasefire and resumed airstrikes in Gaza: on 18 March 2025, Israel killed 183 children in one day.[155]

55.3. On 21 March 2025 Israel destroyed Gaza's only specialist cancer hospital in a controlled detonation, having previously used the hospital as a military base.[156]

55.4. Israeli officials have expressly stated their intent to annex Gaza, for example on 21 March 2025 the Defence Minister said *"I order the army to seize more territory in Gaza.";*[157] Israel has expanded its so-called 'buffer zone' such that it now controls more than 50% of Gaza[158].

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[151] BBC, "Israel blocks entry of all humanitarian aid into Gaza," 2 March 2025, available at: https://www.bbc.co.uk/news/articles/c9q4w99je78o

[152] Tom Fletcher, X post dated 8 April 2025, available at: https://x.com/unreliefchief/status/1909311792339108095?s=46

[153] The Guardian, "Downing Street rejects Lammy's claim Israel broke international law in Gaza," 18 March 2025, available at: https://www.theguardian.com/politics/2025/mar/18/downing-street-rejects-lammy-claim-israel-broke-international-law-gaza

[154] Middle East Eye, "Smotrich says 'not even a grain of wheat' will enter Gaza," 8 April 2025, available at: https://www.middleeasteye.net/live-blog/live-blog-update/smotrich-says-not-even-grain-wheat-will-enter-gaza

[155] The Guardian, "Israeli strikes on Gaza add to soaring child death toll," 20 March 2025, available at: https://www.theguardian.com/world/2025/mar/20/israel-strikes-gaza-child-death-toll.

[156] Al Jazeera, "Israel blows up Gaza's only specialised hospital in massive blast," 22 March 2025, available at: https://www.aljazeera.com/news/2025/3/22/israel-blows-up-gazas-only-specialised-cancer-hospital-in-massive-strike

[157] The Guardian, "Israel to 'seize more ground' and warns Hamas it will annex parts of Gaza," 21 March 2025, available at: https://www.theguardian.com/world/2025/mar/21/israel-katz-warns-hamas-gaza-annex-war

[158] The Guardian, "Airstrike destroys parts of Gaza City hospital as Israel intensifies offensive," 13 April 2025, available at: https://www.theguardian.com/world/2025/apr/13/gaza-city-hospital-hit-ahli-baptist-civil-defence-agency-israel-intensifies-military-operations-katz

55.5. On 24 March 2025, Israel announced it is establishing an agency aimed at *"preparing the voluntary departure of residents of the Gaza Strip to third countries in a safe and controlled manner"* i.e. the mass forced displacement of Palestinians from Gaza.[159]

55.6. Israel killed 15 first responders — eight Palestine Red Crescent Society members, six members of the Civil Defence, and one UN agency employee - in an attack on an emergency vehicle convoy, dispatched to retrieve those injured in an Israeli bombing raid. Their bodies were discovered on 30 March 2025 in a mass grave, handcuffed, with about 20 gunshots in each of the deceased. One had his legs bound, another was decapitated, and a third topless; their bodies had been buried in a shallow grave near to their crushed and mangled ambulances and UN vehicle.[160] (It is noteworthy that such conduct mirrors that described by the Claimant's witness, an ambulance driver who was tortured).[161] The footage retrieved from the mobile phone of one of the killed medics exposed as untrue the account given by Israel about the incident, in which they had claimed that the vehicles had been approaching suspiciously without their emergency lights.[162]

55.7. On 31 March 2025, Israel issued a mass evacuation order for almost the entirety of Rafah, with the warning that Israeli forces are *"returning to intense operations."*[163]

56. Similarly, international bodies, including UN bodies, have continued to conclude that Israel is engaged in widespread and egregious violations of international law in Gaza, particularly with respect to (i) indiscriminate aerial bombardment; (ii) drastically relaxed rules of engagement; (iii) genocide:

56.1. **Indiscriminate aerial bombardment:** The report of a UN Special Committee found on 20 September 2024 that Israel's "*indiscriminate bombing campaign, resulted in the widespread killing of civilians and mass destruction of civilian*

[159] Al Jazeera, "Israel building agency to steer Palestinian 'voluntary departure' from Gaza," 24 March 2025, available at: https://www.aljazeera.com/news/2025/3/24/israel-building-agency-to-steer-palestinian-voluntary-departure-from-gaza
[160] Middle East Eye, "Gaza medics killed by Israel found handcuffed and shot in mass grave," 31 March 2025, available at: https://www.middleeasteye.net/news/bodies-gaza-medics-found-handcuffed-and-shot-mass-grave
[161] Al Asttal [SB/C/20/351-361]
[162] BBC, "Video footage appears to contradict Israeli account of Gaza medic killings," 5 April 2025, available at: https://www.bbc.co.uk/news/articles/c4g2z103nqxo
[163] BBC, "Israel orders evacuation of southern Gaza city of Rafah," 31 March 2025, available at: https://www.bbc.co.uk/news/articles/cq80xqg31x8o

infrastructure";[164] the UN COI found in March 2025 that the exceedingly high proportion of female fatalities as a percentage of the total killings in Gaza since 7 October 2023 was *"primarily* [due to the Israeli military's] *... increased use of heavy air bombardment"* and further that Israel *"intentionally directed its attacks on civilian residential areas and civilian property."*[165]

56.2. **Drastically relaxed rules of engagement:** The Special Committee Report found that "*the unprecedented destruction of civilian infrastructure and high death toll in Gaza ... indicate that the Israeli military lowered the criteria for selecting targets while increasing their previously accepted ratio of civilian to combatant casualties";*[166] a November 2024 report by OHCHR further found that *"[t]he shocking death toll and killing of entire families raise further concerns that, even where legitimate military objectives were targeted, such attacks violated the IHL principle of proportionality";*[167] the UN COI report also found there was *"an expansion of the ISF's targeting criteria to target many more private homes and residential buildings with the stated aim of killing militants even in small numbers… [and as such] the result of the Israeli method of warfare of intentionally destroying and causing suffering to the civilian population has been an increased impact on women and children."*[168]

56.3. **Genocide:** The UN Special Committee found that policies and practices of Israel against Palestinians *"are consistent with the characteristics of genocide.",*[169] OHCHR in November highlighted the statements of Israeli officials that "*posited the*

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[164] United Nations Human Rights Office of the High Commissioner The Special Committee Report, "Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories," [8], 20 September 2024, available at https://docs.un.org/en/A/79/363

[165] The Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, " "More than a human can bear": Israel's systematic use of sexual, reproductive and other forms of gender-based violence since 7 October 2023," [25], [165], 13 March 2025, available at https://www.un.org/unispal/document/report-of-commisison-of-inquiry-opt-13march2025/

[166] United Nations Human Rights Office of the High Commissioner The Special Committee Report, "Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories," [11], 20 September 2024, available at https://docs.un.org/en/A/79/363

[167] United Nations Human Rights Office of the High Commissioner, "Six months update report on the human rights situation in Gaza: 1 November 2023 to 30 April 2024," [17], 08 November 2024, available at https://www.un.org/unispal/document/update-report-08nov24/

[168] The Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, " "More than a human can bear": Israel's systematic use of sexual, reproductive and other forms of gender-based violence since 7 October 2023," [26] and [28], 13 March 2025, available at https://www.un.org/unispal/document/report-of-commisison-of-inquiry-opt-13march2025/

[169] United Nations Human Rights Office of the High Commissioner The Special Committee Report, "Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories," [69], 20 September 2024, available at https://docs.un.org/en/A/79/363

end of the conflict as contingent upon Gaza's entire destruction and the exodus of the Palestinian people";[170] in March 2025 the UNCOI found unequivocal breaches of the Genocide Convention, for example "*The Commission concludes that the ISF caused serious bodily and mental harm to members of this group, and deliberately inflicted conditions of life that were calculated to bring about the physical destruction of Palestinians in Gaza as a group, in whole or in part, which are categories of genocidal acts in the Rome Statute and the Genocide Convention."*[171]

57. As described by UN Secretary General Antonio Guterres on 8 April 2025, *"Gaza is a killing field – and civilians are in an endless death loop."*[172]

III. PROCEDURAL BACKGROUND

A. THE ORIGINAL CLAIM

58. The Claimant first sent a pre-action letter to the SSBT on 16 October 2023, followed by further letters on 21 October 2023 and 8 November 2023. The SSBT failed to respond substantively to those letters.

59. The Claimant issued its claim on 6 December 2023 [CB/A/1/6-21]. Initially, the Claimant's challenge was to an inferred decision by the SSBT not to revoke or suspend arms export licences to Israel, and an inferred decision not to engage the temporary suspension mechanism. The SSBT filed Summary Grounds of Defence on 12 January 2024.

60. Permission was initially refused by Eyre J on 19 February 2024. The Claimant renewed its application for permission on 23 February 2024. Following agreement with the SSBT for a rolled-up hearing and a costs-capping order, on 26 April 2024 Swift J ordered that a hearing be listed in October 2024 [CB/B/5/234-236].

61. On 14 June 2024, Farbey J made a declaration for closed material proceedings under s.6 of the Justice and Security Act 2013 on the application of the SSBT. Closed material

[170] United Nations Human Rights Office of the High Commissioner, "Six months update report on the human rights situation in Gaza: 1 November 2023 to 30 April 2024," [63]-[64],08 November 2024, available at https://www.un.org/unispal/document/update-report-08nov24/.
[171] The Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, " "More than a human can bear": Israel's systematic use of sexual, reproductive and other forms of gender-based violence since 7 October 2023," [178], 13 March 2025, available at https://www.un.org/unispal/document/report-of-commisison-of-inquiry-opt-13march2025/
[172] UN News, 'Gaza: Guterres calls on Israel to ensure life-saving aid reaches civilians', 8 April 2025, available here: https://news.un.org/en/story/2025/04/1161996.

applications have since been made by the SSBT as to a number of documents which have not been disclosed in OPEN; the Court will consider the submissions of the Claimant's Special Advocates as to this material in CLOSED.

B. THE CLAIM AGAINST THE PRE-SEPTEMBER DECISIONS

62. The Claimant made an application to amend its Statement of Facts and Grounds on 16 August 2024, following disclosure, in order to challenge further decisions not to revoke or suspend export licences to Israel made by the SSBT on 18 December 2023 (the "**December Decision**") [SB/E/57/795-796], 8 April 2024 (the "**April Decision**") [SB/E/81/987], and 28 May 2024 [SB/E/96/1171] (the "**May Decision**", collectively the "**Pre-September Decisions**") (further addressed below at Section III.C). However, before that application could be determined by the Court, the SSBT made the September Decision. On 3 September 2024 [CB/B/8/242-245], Chamberlain J ordered disclosure in respect of the September Decision and made directions for the further filing of pleadings.

63. Accordingly, the Claimant made a further application to amend its Statement of Facts and Grounds on 23 October 2024 [SB/H/188/2810-3030]. The Amended Statement of Facts and Grounds at that stage advanced 13 grounds: Grounds 1-7 related to the pre-September Decisions, whilst Grounds 8-13 were fresh challenges to the September Decision.

64. The SSBT's position was that Grounds 1-7 were academic and should not be determined by the Court. The Claimant's position was that Grounds 8-12 overlapped with Grounds 1-7 (referred to as the "*linkage*" issue), on the basis that the methodological errors identified in Grounds 1-7 had a material bearing on the SSBT's decision to depart from the SELC via the F-35 Carve-Out. The SSBT's skeleton argument filed on 12 November 2024 at ¶37 stated that it was "*conceivable*" that "*the September Decision could itself be overtaken in the future; and exports resumed*" but that "*that provides no justification for continuing with non-live and academic claims*."

65. On 18 November 2024, at an interim hearing to determine the Claimant's amendment application, Chamberlain J made directions for the SSBT to file Grounds of Resistance responding to Grounds 8-13 and for further submissions to be filed by the parties as to the linkage issue [CB/B/10/249-250].

66. The SSBT filed his Grounds of Resistance on 20 December 2024 and the Claimant filed a Reply on 10 January 2025. The SSBT clarified his position that the "*clear risk*" test under Criterion 2(c) the SELC is binary and that the SSBT carried out no calibration exercise as to the level of risk, other than to determine that the clear risk threshold had been passed (Grounds of Resistance ¶¶14, 19, now reflected in ADGR ¶7(g) [CB/A/3/137]). The Grounds of Resistance provided as follows:

66.1. At ¶14(c): "*The premise for the F-35 Carve Out was thus that there was a clear risk that Israel might commit serious violations of IHL in the conduct of hostilities including through the use of F-35s. The risk was therefore taken as established, including in relation to the conduct of hostilities. Moreover, there was no need to seek further to finesse or calibrate that clear risk, even leaving aside the difficulties of trying to do so*."

66.2. At ¶19: "*Given (i) the forward-looking nature of this assessment, and (ii) the fact that the Defendant's 'good reason' for departing from the SELC, namely the interests of international peace and security, was, for reasons explained at §§137-139 below, a matter of such gravity (the existence and magnitude of which the Claimant does not challenge) that it would have overridden any such further evidence of serious breaches of IHL, the errors alleged in Proposed Grounds 2 to 5 are irrelevant to Proposed Ground 12*."

66.3. At ¶140: "*In other words, given the forward-looking nature of this assessment, this element of risk would not have weighed more heavily in the balance even if the Defendant had adopted a different approach to the analysis of Israel's conduct of hostilities and even if that different approach had led him to reach a different conclusion on Israel's compliance with IHL in that regard*".

67. On 30 January 2025, Chamberlain J handed down a judgment on the linkage issue (the "**January Judgment**") [CB/B/11/251-265]. Permission to advance Grounds 1-7 was refused. Chamberlain J held that there was no linkage because the SSBT undertook no calibration of the level of risk (January Judgment at ¶¶44-45) [CB/B/11/262]. Chamberlain J noted the Claimant's case that the linkage arises because "*the evidence enabled the Secretary of State to say more than just that there was a 'clear risk' of UK-supplied weapons being used to commit a serious violation of IHL and, had he appreciated the true nature and extent of the risk, his decision might have been different*"

but held that there was no linkage on the basis of the SSBT's submission that he did not in fact calibrate the level of risk: "*This was because* [the alleged damage to international peace and security] *was "a matter of such gravity* […] *that it would have overridden any such further evidence of serious breaches of IHL" (Grounds of Resistance, para. 19, cited at para. 17 above)*". Chamberlain J granted permission to amend as to Grounds 8-12, noting that "*there is a real prospect that a court considering this issue at the permission stage would regard one or more of grounds 8-12 as arguable. If permission were refused on one or more grounds, there is the real prospect of an appeal*": January Judgment at ¶52(b) [CB/B/11/263-264].

68. Chamberlain J ordered a rolled-up hearing as to those grounds and Ground 13 on an expedited basis. Accordingly, the basis on which this claim proceeds is that the Court will not make any determination as to the lawfulness or otherwise of SSBT's approach to assessing Criterion 2(c). This means that, as set out further below, the alleged difficulties presented by an assessment of Criterion 2(c) in the context of these hostilities (relied upon by the SSBT at ADGR ¶¶7(b), (g), 123 [CB/A/3/136, 137, 175]) are irrelevant.

69. Pursuant to the January Judgment, the Claimant filed a further ASFG on 6 February 2025 [CB/A/2/22-133].[173] The SSBT filed his ADGR on 28 February 2025 [CB/A/3/134-179].[174]

70. On 19 March 2025, the court by order varied permission to intervene to allow the Interveners to file certain evidence and written submissions. However, permission to rely on evidence post-dating the September Decision was denied. As explained at paragraph 6 of the reasons [CB/B/15/279]:

> Evidence which post-dates the 2 September 2024 decision, and so was not before the decision-maker at the time when the challenged decision was taken, will not be admitted. Insofar as it casts light on what was available to the decision-maker at the time of the decision, its relevance is not so great as to justify its admission at this stage, given the extensive materials already before the court and the burden which it might place on the defendant to respond to it.

[173] The Court granted permission for that version on 14 February 2025, save for a minor change which was implemented by the current ASFG, filed on 17 February 2025.
[174] The SSBT's application to amend his defence by way of the ADGR on 28 February 2025 is pending.

C. PRE-SEPTEMBER DECISIONS

71. This section summarises the Pre-September Decisions and the basis on which they were taken. No challenge is brought as to these decisions and the Claimant refers to them briefly only by way of background.

72. The SSBT's decisions were informed by analysis and advice from other bodies. The SSBT was advised by the SSFCDA as to whether there was a clear risk that exported items might be used by Israel to commit or facilitate serious IHL violations. The SSFCDA's advice was in turn based on advice from a team of officials in the Export Control Joint Unit ("**ECJU**").[175] That advice was based on assessments of Israel's capability, commitment and compliance with IHL undertaken by a team of FCDO officials known as the "IHL Compliance Assessment Process Cell" ("**IHLCAP Cell**"), which also compiled "Evidence Bases" for those assessments. From 4 December 2023 onwards, the Evidence Bases were derived in significant part from materials prepared by the Centre for Information Resilience ("**CIR**"), a social enterprise which had been contracted by HMG.[176]

73. Between 7 October 2023 and the December Decision, the SSBT failed to engage the temporary suspension mechanism (and no material has been disclosed to indicate that mechanism was even considered at this stage, despite the Claimant having made enquiries as to this in correspondence); and the SSBT continued to grant new licences for the export of military equipment to Israel to be used by the Israeli military: Pratt 1, ¶82 [SB/B/13/107-108].

74. **The December Decision**: on 18 December 2023 the SSBT decided not to suspend export licences, following advice from the SSFCDA that there was no clear risk that Israel would use exported items to commit or facilitate IHL breaches because Israel was committed to complying with IHL.[177] The decision was based on material prepared by the IHLCAP Cell, and advice from the ECJU.[178] The IHLCAP Cell refused to undertake

[175] A cross-departmental team of officials from the Department for Business and Trade, the FCDO and the Ministry of Defence (Hurndall 2, ¶6) [SB/B/12/80].
[176] In particular, CIR would collate a limited log of incidents from open source material in the "**CIR Log**", as well as statements made by Israeli officials [SB/E/99/1179-1321].
[177] Email from SSFCDA's Private Office to Defendant's Private Office, 14 December 2023 (Exhibit RP1-06) [SB/E/54/739-740].
[178] This included: three assessments by IHLCAP Cell (10 November 2023 (Exhibit CH2-12) [SB/E/44/586-589], 20 November 2023 (Exhibit CH2-17) [SB/E/46/635-643], 30 November 2023 (Exhibit CH2-8) [SB/E/49/665-673]); two Evidence Bases prepared by IHLCAP Cell (3 November 2023 (Exhibit CH2-7A) [SB/E/41] and 27 November 2023, (Exhibit CH2-7A) [SB/E/41/550] and (Exhibit CH2-7B) [SB/E/45/590]; an ECJU submission dated 8 December 2023

a case-by-case assessment of Israel's compliance with IHL for specific strikes or ground operations on the basis that HMG does "*not have insight into Israel's case-by-case operational decision making*" (Exhibit CH2-12) [SB/E/44/587]. At that stage (as recorded by the assessment) Israel had already struck Gaza over 9,000 times in four weeks, resulting in over 9,227 Palestinian casualties, and the destruction of almost half of Gaza's housing stock.

75. On 8 April 2024 — following two decisions by the ICJ determining there was a real and imminent risk that Palestinians would be subjected to genocide — the SSBT reached the same conclusion in **the April Decision**. That conclusion followed advice from the SSFCDA on 3 April 2024 to the effect that, although Israel was not committed to complying with IHL in relation to humanitarian relief, that did not affect its commitment as to the conduct of hostilities more generally and specific exported items did not pose a clear risk in respect of humanitarian relief (Exhibit CH2-36) [SB/E/79/976].[179] The IHLCAP Cell assessment of 29 December 2023 (Exhibit CH2-25) [SB/E/61/811] concluded that there was insufficient information to come to any conclusion in relation to any of the five incidents which it considered. No attempt was made to assess the remainder of incidents in the CIR Log, which included (for example) verified footage of Israeli soldiers shooting into a crowd of individuals, including children, travelling along a "safe passage".[180] The IHLCAP Cell assessment of 21 March 2024 similarly reached no conclusion as to 12 of 12 incidents (Exhibit CH2-34) [SB/E/74/947], including the raid on Ibn Sina Hospital on 29 January 2024, in which (as recorded by the assessment) Israeli forces shot three men (reportedly linked to Hamas) in their hospital beds as they slept, one of whom was already paralysed by a spinal injury (Exhibit CH2-7G) [SB/E/85/1036].

(Exhibit CH2-23) [SB/E/51/726]; and a further ECJU submission dated 13 December 2023 (Exhibit RP1-07) [SB/E/55]

[179] Two IHLCAP Cell Assessments, dated 29 December 2023 (Exhibit CH2-25) [SB/E/61/811-818] and 21 March 2024 (Exhibit CH2-32) [SB/E/74/925-948]; four IHLCAP Cell Evidence Bases [SB/E/41/550-574] [SB/E/45/590-634] [SB/E/50/674-725] [SB/E/56/762-794] ; a CIR Log and a CIR Public Statement List, and fortnightly and ad hoc CIR Reports (CIR Fortnightly Incident Reports 2 December 2023 to 5 June 2024 in the form of a cumulative spreadsheet (Exhibit CH2-4) [SB/E/99/1179-1321]; Summary of Fortnightly Reports from 17 November 2023 to 5 June 2024 (Exhibit CH2-5) [SB/E/100/1322-1417] Table summary of CIR and ad-hoc reports (Exhibit CH2-6) [SB/E/104/1432]) [SB/E/99/1179-1321]; an ECJU review of SELC Criteria other than Criterion 2(c) (Exhibit CH2-46) [SB/E/63/820-821]; two Ministerial Submissions dated 28 March (Exhibit CH2-35) [SB/E/78/966-975] and 4 April 2024 (Exhibit RP1-13) [SB/E/80/978-986]; and advice from the SSFCDA on 3 April 2024 (Exhibit CH2-36) [SB/E/79/976-977].

[180] [CH2-4/20] (CIR IPIN006).

76. On 28 May 2024**,** the SSBT maintained the same position in the **May Decision** (Exhibit RP1-18) [SB/E/96/1171]. That decision followed the SSFCDA's advice on 23 May 2024 that, in his view, Israel remained committed to complying with IHL, despite possible violations having been identified and the existence of "*specific and serious concerns*" as to Israel's commitment: (Exhibit CH2-43) [SB/E/94]. In particular, the IHLCAP Cell assessment dated 20 May 2024 found possible violations in respect of one strike and as to humanitarian aid obligations, as well as concerns as to the treatment of detainees. The assessment did not consider other incidents recorded by the CIR Log, such as verified footage of Israeli soldiers executing a man standing with his hands on his head in the West Bank (Exhibit CH2-4) [SB/E/99/1218]. At that time, 1.1 million people were estimated to be facing famine-like conditions (catastrophic levels of food insecurity): (Exhibit CH2-39) [SB/E/83/996].

77. The IHLCAP assessment of 24 July 2024 made clear that only 413 incidents of concern had been identified since 17 November 2023, and that the IHLCAP Cell had reached a conclusion in relation to just two of those incidents. This was on the basis that the IHLCAP Cell did not have sufficient information to reach any conclusion as to the balance of the incidents of concern, absent the provision by Israel of further incident-specific operational information.

D. SEPTEMBER DECISION

78. By **the September Decision**, the SSBT decided that:

78.1. Israel was not committed to complying with IHL in Gaza.

78.2. There was a clear risk that certain items exported might be used by Israel to commit or facilitate serious IHL violations.

78.3. On that basis, extant licences for equipment assessed to be for use in military attacks in Gaza would be suspended (i.e. the Suspension Decision).

78.4. However, there was good reason to depart from the SELC and to exclude licences for F-35 components from the scope of the suspension, save for licences for F-35 components which could be identified (at the point of export) as going to Israel (i.e. the F-35 Carve Out).[181]

[181] Exhibit RP2-5 [CB/C/16/280-281]; Exhibit RP2-6 [CB/C/18/284].

78.5. New licence applications would be treated on the same basis; final decisions on all licence applications would continue to be presented to the SSBT for review.

78.6. According to ADGR ¶6 [CB/A/3/135-136], as at the time of the September Decision, 34 out of 361 extant licences were identified as items which could be used for military operations in the current conflict in Gaza, of which 5 related to F-35 components — such that "*The remaining 29 licences were suspended (or amended to remove Israel as a permitted end-user)*".

78.7. As recorded in the ministerial submission dated 24 July 2024, the September Decision proceeded on the basis that the export of licences was consistent with the UK's international obligations and therefore not in violation of Criterion 1 of the SELC. That conclusion was based in significant part on an assessment which had been conducted on 11 June 2024 (and was therefore, at that point, significantly out of date).[182]

79. The materials underlying the September Decision (as recorded in a letter from the SSBT to the SSFCDA on 2 September 2024 (Exhibit RP2-6) [CB/C/18/284]) are addressed in detail in ASFG ¶¶144-196 [CB/A/2/87-105]. As with the Pre-September Decisions, the September Decision was based on advice from the SSFCDA, submissions from ECJU, and Evidence Bases and various other materials.[183] The key materials were as follows.

80. On 18 July 2024, the Defence Secretary wrote a letter to the SSBT stating the suspension of the export of F-35 components would have an "*impact on the entire F-35 programme*" (Exhibit RP2-8) [CB/E/29/586]. It explained that this was because the F-35 global fleet is sustained by a "*Global Support Solution*" ("**GSS**") which provides a "*support service to all F-35 users, including Israel*". This service is operated by independent contractors which "*demand parts to top up the GSS spares pool in response to the collective demand*

[182] Annex E to the Ministerial Submission dated 24 July 2024 to the SSFCDA states that a "*consolidated review*" carried out on 11 June 2024 had "*concluded that extant licenses remain consistent with the UK's relevant international obligations, including under the Arms Trade Treaty (ATT) and the Genocide Convention*" (Exhibit RP2-1c) [CB/E/35/609-610], and that Israel did not harbour genocidal intent, because "*negative comments from specific actors" were "not assessed to be representative of the Israel Government overall*" and the "*areas of most acute concern with respect to compliance with IHL do not relate to Israel making civilians the object of attack*". Similarly, the 30 August 2024 Ministerial submission to the SSBT asserted that licences were not in violation of any other SELC Criteria, including Criterion 1 — apparently based on the same assessment as the July submission (Exhibit RP2-4) [CB/E/56/899].

[183] Including: ministerial submissions dated 11 July 2024, 24 July 2024, 26 August 2024, and 30 August 2024; an Evidence Base, a letter from the SSFCDA dated 29 August 2024 and various other materials as set out at ASFG ¶144 [CB/A/2/87].

from across the F-35 enterprise", and UK suppliers accordingly provide parts and components when demanded without knowledge of which State the part would ultimately be used by. The advice attached to the letter (Exhibit RP2-9) [CB/E/30/588-593] states that suspending all provision of F-35 components for Israel would lead to "*disruption for F-35 aircraft across the enterprise* [...] *within weeks*" because of the "*interruption in supplies to the GSS*" (Exhibit RP2-9) [CB/E/29/590]. It does not explain why such disruption would necessarily arise. A section as to whether there are options available to mitigate the impact of a suspension decision is entirely redacted. No evidence has been adduced of any engagement with the US or other F-35 partner nations as to mitigation options (despite the Claimant's requests in correspondence: Letter from Claimant to Defendant dated 8 November 2024 ¶ D1 [SB/A/6/51]; and Letter from Claimant to Defendant dated 11 March 2025 ¶ 4 [SB/A/9/61]).

81. The IHLCAP Cell assessment dated 24 July 2024, which concerned the period 25 April to 19 June 2024 [CB/E/41/689-737]. In the reporting period, 65 incidents were logged, of which at least 31 were likely to have been airstrikes. As with previous IHLCAP Cell assessments, the assessment as to the conduct of hostilities considered a small number (13) of incidents on a case by case basis, concluding that there was insufficient evidence to assess 12 of those incidents,[184] including (by way of example) an incident in which between 90 and 274 Palestinians, including children, were killed in the course of an Israeli hostage rescue operation (¶¶54-56) [CB/E/41/704]. By reason of that same alleged insufficiency of information, the IHLCAP Cell disregarded authoritative conclusions of various international bodies, including the Prosecutor of the ICC, the ICJ and the UNHRC's COI.[185] Overall as to the conduct of hostilities, the assessment concluded that Israel had capability to comply with IHL, had stated commitment to comply and that no breaches had been identified. However, the assessment found

[184] Save for an airstrike in the Tel Al-Sultan district of Rafah on 26 May 2024, which was considered unlikely to have constituted a violation of IHL [CB/E/41/689]
[185] See further ASFG ¶166 [CB/A/2/93-94].

possible violations[186] of IHL as to humanitarian access and relief[187] and the treatment of detainees.[188]

82. The 24 July 2024 ministerial submission to the SSFCDA as to IHL commitment at (Exhibit RP2-1) [CB/E/31/594-596] contained advice from the ECJU (on the basis of the IHLCAP Assessment) that, due to breaches of IHL in the areas of humanitarian aid and treatment of prisoners (and notwithstanding that the government was not able to determine whether there had been breaches as to conduct of hostilities), Israel was not committed to complying with IHL as a whole (including in the conduct of hostilities). The submission recommends that the SSFCDA "*concludes that overall Israel is not committed to complying with IHL*",[189] on the basis of the "*concerns raised and conclusions, including on possible violations of IHL*" by reference to the period of the IHLCAP Cell assessment.

83. A separate submission to the SSFCDA in relation to advising the SSBT, made on the same day, stated that it was "*not open to the Foreign Secretary to conclude that Israel is committed to comply with IHL*" (¶5) [CB/E/37/638]. The reasoning for that conclusion has been redacted on the basis of legal privilege. The submission recommended that the SSFCDA make a decision by the following day (25 July 2024) in time for the SSBT to make a decision on 26 July and for a statement to be made to Parliament on 30 July 2024. However, no action was immediately taken: per Pratt 2 at ¶7 [CB/D/23/523], "*the issue was kept under close review during August against the backdrop of the rapidly developing situation in the region at this time*".

84. On 29 August 2024, the SSFCA wrote to the SSBT to convey his conclusion that Israel was not committed to complying with IHL overall in the military attacks in Gaza (Exhibit RP2-10) [CB/E/57/906-907]. The SSFCDA considered that the only conclusion

[186] Note that, per the IHLCAP Cell's methodology, a "possible" violation is the strongest conclusion it was able to come to.
[187] The assessment considered that the issue was "finely balanced", but that there was "*more that Israel could reasonably do to facilitate humanitarian access*" [CB/E/41/690]. In particular, despite various inadequacies in the information available (¶122) [CB/E/41/724], the IHLCAP Cell determined that feedback from a range of stakeholders that Israel's approach to facilitation of humanitarian access was "excessively restrictive" enabled a conclusion that there had been a possible breach of IHL (¶131) [CB/E/41/726].
[188] The Assessment concluded that there had been possible instances of mistreatment of prisoners contrary to IHL both at point of detention and during detention, and in relation to denying the ICRC access to prisoners [CB/E/41/690], and that the "volume and consistency of the allegations indicate that there have been at least some instances of mistreatment contrary to IHL" (¶155) [CB/E/41/732].
[189] Indeed, the submission stated that it was "*not open to the Foreign Secretary to conclude that Israel is committed to comply with IHL*" (¶5, emphasis added) [CB/E/37/638]. The reasoning for that conclusion has been redacted on the basis of legal privilege.

available to him was that the clear risk threshold under Criterion 2(c) had been met in Israeli military activity in Gaza. His advice to the SSBT was therefore that licences for items for use in military attacks in Gaza should be suspended. The letter also advised the SSBT to *"take exceptional measures*" as to F-35 components, the suspension of which "*is likely to cause significant disruption to the F-35 programme, which would have a critical impact on international peace and security, including NATO's defence and deterrence*".

85. A submission on 30 August 2024 provided options for suspension (Exhibit RP2-4) [CB/E/56/896]: (i) to follow the SSFCDA's recommendation to suspend extant licences for equipment assessed to be for use in military attacks in Gaza ("**Option 1**"); or (ii) to "*go beyond"* what the SSBT considered to be a *"strict application*" of the SELC and "*send a political signal*" by suspending all extant licences for use by the Israeli army regardless of their potential use (including items "*such as trainer aircraft, but also air defence components"* assessed as *"important for Israel to defend itself against Iran and Hizballah as well as rockets from Gaza*") ("**Option 2**") (Exhibit RP2-4) [CB/E/56/896].[190] Option 1 was presented as the "*minimum category of licences that must be suspended*" (emphasis added). Accordingly, the suspension decision represents the minimum option that the SSBT considered to be legally compliant.

86. The 30 August 2024 Ministerial submission asked whether the SSBT agreed with its advice that "*(i) there are good reasons to depart from the SELC; (ii) the impact on international peace and security of suspending these exports overrides the IHL risk, and therefore that (iii) licences permitting export to the F-35 programme should be excluded from your decision on suspension*" (save for the parts going directly to Israel or where Israel is known to be the end-user at the time of export) (Exhibit RP2-4) [CB/E/56/903]). The submission stated that the F-35 programme was "*significantly dependent upon UK suppliers*", and that suspension would have "*a serious impact on all F-35 operating nations, not just Israel*" (Exhibit RP2-4) ¶¶18, 21 [CB/E/56/900-901]. It asserted that there was no way to determine at the time of export to the GSS which partner or customer nation would ultimately receive the exported parts and that if Israel were removed from the end-user list on the licences, "*it would render them unusable*" because

[190] The submission also noted that it was possible to revoke licences rather than to suspend them, but that this would be a "*more permanent action*", since exporters would need to re-apply for the revoked licence. Since a suspension could either be lifted or turned into a definite revocation, suspension was recommended as the appropriate response (Exhibit RP2-4) [CB/E/56/899].

exporters do not know the final destination (Exhibit RP2-4) ¶20 [CB/3/56/900]. The SSBT was invited to consider the balance between the risk of "*wider unintended consequences to the F-35 programme*" arising from suspension, and the fact that UK components could be drawn from the Global Spares Pool and used in F-35s belonging to Israel (Exhibit RP2-4) ¶ 26 [CB/E/56/902].

87. The September Decision (letter from SSBT to SSFCDA dated 2 September 2024 [CB/C/18/284]) referred to the Defence Secretary's advice and expressed "*the view that this provides justification to take exceptional measures to avoid these impacts, consistent with the UK's domestic and international legal obligations*" (emphasis added).

88. The ADGR at ¶¶4, 7, 123 [CB/A/3/135, 136, 175] confirm that the September Decision was made on the basis that "*that Israel is overall not committed to compliance with IHL in Gaza, including in the conduct of hostilities*" (emphasis added).

89. Per the ADGR ¶7(g) [CB/A/3/137], the F-35 Carve Out decision was taken without any calibration of the extent, nature or gravity of the risk presented under Criterion 2(c), other than merely that the binary "clear risk" test had been passed:

> g. The premise for the F-35 Carve Out was thus that there was a clear risk that Israel might commit serious violations of IHL in the conduct of hostilities including through the use of F-35s. The F-35 Carve Out accepts that there is clear risk that F-35 components might be used to commit or facilitate a serious violation of IHL but determines that in the exceptional circumstances outlined by the Defence Secretary, these exports should nonetheless continue. The risk was therefore taken as established, including in relation to the conduct of hostilities. Moreover, there was no need to seek further to finesse or calibrate that clear risk, even leaving aside the difficulties of trying to do so. In those circumstances, the F-35 Carve Out decision making did not turn on any such finessing or calibration of risk.

90. The SSBT has disclosed in correspondence that he has made a number of subsequent decisions since the September Decision.[191] The F-35 Carve Out remains in place and these subsequent decisions are not currently under challenge.

[191] Letter from GLD dated 25 February 2025 [SB/H/190/3051-3058].

IV. THE DOMESTIC LEGAL FRAMEWORK

A. THE EXPORT CONTROL ACT 2002

91. The export of arms and military equipment from the UK to Israel is regulated by the 2002 Act.

92. Section 1(1) of the 2002 Act provides that the Secretary of State may by order make provision for or in connection with the imposition of export controls in relation to goods of any description. Section 1(2) of the 2002 Act provides that, for the purpose of the Act, "*export controls*" means "*in relation to any goods* [...] *the prohibition or regulation of their exportation from the United Kingdom or their shipment as stores*".

93. Section 1(4) provides that the power to impose export controls is subject to section 5.

94. Section 5 provides materially as follows:

> (1) Subject to section 6,[192] the power to impose export controls, transfer controls, technical assistance controls or trade controls may only be exercised where authorised by this section.
>
> (2) Controls of any kind may be imposed for the purpose of giving effect to any EU provision or other international obligation of the United Kingdom.
>
> […]
> (4) Export controls may be imposed in relation to any description of goods within one or more of the categories specified in the Schedule for such controls

95. Paragraph 1(1)(a) of Schedule 1 provides that export controls may be imposed in relation to military equipment.

96. Section 9 provides (emphasis added):

> (1) This section applies to licensing powers and other functions conferred by a control order on any person in connection with controls imposed under this Act.
>
> (2) The Secretary of State may give guidance about any matter relating to the exercise of any licensing power or other function to which this section applies.

[192] Section 6 provides that section 5 does not apply to (i) control orders which expire no later than 12 months from the date on which they are made and (ii) control orders which amend, revoke, or re-enact an earlier control order without imposing new controls or strengthening controls previously imposed. It is not material for the purposes of this claim.

(3) But the Secretary of State must give guidance about the general principles to be followed when exercising licensing powers to which this section applies.

(4) The guidance required by subsection (3) must include guidance about the consideration (if any) to be given, when exercising such powers, to—

(a) issues relating to sustainable development; and

(b) issues relating to any possible consequences of the activity being controlled that are of a kind mentioned in the Table in paragraph 3 of the Schedule; but this subsection does not restrict the matters which may be addressed in guidance.

(5) Any person exercising a licensing power or other function to which this section applies shall have regard to any guidance which relates to that power or other function.

(6) A copy of any guidance shall be laid before Parliament and published in such manner as the Secretary of State may think fit.

(7) In this section "guidance" means guidance stating that it is given under this section [...]

97. The Table in paragraph 3 of the Schedule to the 2002 Act refers to the "*possible consequences of the activity being controlled*" which "*must*" be addressed in the statutory guidance. These include:

Breaches of international law and human rights:
The carrying out anywhere in the world of (or of acts which facilitate)—
(a) acts threatening international peace and security;
(b) acts contravening the international law of armed conflict;
(c) internal repression in any country;
(d) breaches of human rights.

98. In accordance with s.9 of the 2002 Act, the SSBT has given guidance by way of the SELC (addressed in subsection C below).

B. THE EXPORT CONTROL ORDER 2008

99. The SSBT exercised his powers under s.1 of the 2002 Act in making the Export Control Order 2008 (SI 2008/3231) (the "**2008 Order**").

100. Article 3 of the 2008 Order provides that, subject to articles 13 to 18 and 26, no person shall export (inter alia) military goods. Military goods are defined in article 2 to include

all goods listed in schedule 2. Schedule 2 includes at ML10 "'*Aircraft*'[193] [...] *related goods and components, as follows, specially designed or modified for military use*", including at MLA10a "*manned aircraft* [...] *and specially designed components therefor*".

101. The general prohibition on the export of military goods is subject to exceptions, including materially for the purpose of this claim the exception contained in article 26, which provides:

> (1) Nothing in Part 2, 3 or 4 prohibits an activity that is carried out under the authority of a UK licence. […]
> (6) A licence granted by the Secretary of State may be—
> (a) either general or granted to a particular person;
> (b) limited so as to expire on a specified date unless renewed;
> (c) subject to, or without, conditions and any such condition may require any act or omission before or after the doing of the act authorised by the licence.

102. Article 32 of the 2008 Order confers on the SSBT a power to amend, suspend or revoke a license granted by him, or to suspend or revoke a general license as it applies to a particular license user. This is the power pursuant to which the Suspension Decision was taken.

C. THE SELC

103. As set out above, the SSBT is required by s.9(3) of the 2002 Act to provide guidance as to the "*general principles to be followed when exercising licensing powers*" under the 2008 Order. He has discharged that obligation by adopting the SELC.

104. The Parliamentary statement introducing the SELC included the following explanation (emphasis added):

> HM Government is committed to a robust and transparent export control regime for military, dual-use and other sensitive goods and technologies. The purpose of these controls is to promote global security and facilitate responsible exports. They help ensure that goods exported from the United Kingdom do not contribute to the proliferation of weapons of mass destruction (WMD) or a destabilising accumulation of conventional weapons. They protect the United Kingdom's security and our expertise by restricting who has access to sensitive technologies and capabilities. Export controls also help ensure that controlled items are not used for internal repression or in the commission of serious violations of international humanitarian law. They are one of the means by which we implement a

[193] Defined in article 1 to mean a "fixed wing, swivel wing, rotary wing, tilt rotor or tilt wing vehicle or helicopter".

range of international legal commitments including the Arms Trade Treaty […]

These Criteria will be applied with immediate effect to all licence decisions (including decisions on appeals) for export, transfer, trade (brokering) and transit/transhipment of goods, software and technology subject to control for strategic reasons (referred to collectively as "items") […]

As before, they will not be applied mechanistically but on a case-by-case basis taking into account all relevant information available at the time the licence application is assessed. While the Government recognises that there are situations where transfers must not take place, as set out in the following Criteria, we will not refuse a licence on the grounds of a purely theoretical risk of a breach of one or more of those Criteria. In making licensing decisions I will continue to take into account advice received from FCDO, MOD, and other government departments and agencies as appropriate […]

105. The most relevant portions of the SELC for the purposes of this claim are as follows:[194]

CRITERION ONE

Respect for the UK's international obligations and relevant commitments, in particular sanctions adopted by the UN Security Council, agreements on non-proliferation and other subjects, as well as other international obligations.

The Government will not grant a licence if to do so would be inconsistent with, inter alia: […]

(b) the UK's obligations under the [UN] Arms Trade Treaty; [...]

(f) the OSCE principles governing conventional arms transfers.

CRITERION TWO

Respect for human rights and fundamental freedoms in the country of final destination as well as respect by that country for international humanitarian law.

Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, the government will:

(a) Not grant a licence if they determine there is a clear risk that the items might be used to commit or facilitate internal repression;

Internal repression includes, inter alia, torture and other cruel, inhuman and degrading treatment or punishment; summary or arbitrary executions; disappearances; arbitrary detentions; and other serious violations of human

[194] Emphasis added throughout.

rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights. […]

(b) Exercise special caution and vigilance in granting licences, on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN or the Council of Europe;

Having assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law, the Government will:

(c) Not grant a licence if they determine there is a clear risk that the items might be used to commit or facilitate a serious violation of international humanitarian law.

In considering the risk that items might be used to commit or facilitate internal repression, or to commit or facilitate a serious violation of international humanitarian law, the Government will also take account of the risk that the items might be used to commit or facilitate gender-based violence or serious acts of violence against women or children.

CRITERION THREE

Preservation of internal peace and security

The Government will not grant a licence if, having assessed the potential that the items would either contribute to or undermine internal peace and security, it determines there is a clear risk that the items would, overall, undermine internal peace and security.

CRITERION FOUR

Preservation of peace and security

The Government will not grant a licence if, having assessed the potential that the items would either contribute to or undermine peace and security, it determines there is a clear risk that the items would, overall, undermine peace and security.

106. The SELC replaced and are materially similar to the "*Consolidated EU and National Arms Export Licencing Criteria*", which implemented EU Council Common Position 2008/944/CGSP (the "**Common Position**").[195] Article 13 of the Common Position provides that "*the User's Guide to the European Code of Conduct on Exports of Military*

[195] Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, OJ L 335 13.12.2008, p. 99. See, in particular, Article 2, which sets out criteria that are similar to those in the SELC.

Equipment" ("**User's Guide**") shall serve as guidance for its implementation.[196] The continuing relevance of the User's Guide to the interpretation of the SELC is pleaded at ASFG ¶92 [CB/A/2/60] and is not disputed in the ADGR.

107. The User's Guide provides relevantly as follows:[197]

> [CRITERION ONE]
>
> 1.1 The purpose of Criterion One is to ensure in particular that […] international obligations, are respected. All export licences should be assessed on a case-by-case basis and consideration should be given to Criterion One where there are concerns over the inconsistency with international commitments or obligations. [...]
>
> 1.3 [...] When forming a judgment on issuing a licence, in order to avoid conflict with their international obligations, Member States should follow the strictest restrictions that are binding or applicable to them.
>
> [CRITERION TWO – SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW]
>
> 2.11 [...]
>
> Have violations been committed by any actor for which the State is responsible? (e.g. state organs, including the armed forces; persons or entities empowered to exercise elements of government authority; persons or groups acting in fact on its instructions or under its direction or control; violations committed by private persons or groups which it acknowledges and adopts as its own conduct.)
>
> Has the recipient country failed to take action to prevent and suppress violations committed by its nationals or on its territory?
>
> Has the recipient country failed to investigate violations allegedly committed by its nationals or on its territory?
>
> Has the recipient country failed to cooperate with other states, ad hoc tribunals or the International Criminal Court in connection with criminal proceedings relating to violations of international humanitarian law?
>
> 2.13 Clear risk: A thorough assessment of the risk that the proposed export of military technology or equipment will be used in the commission of serious violations of international humanitarian law should include an inquiry into the recipient's past and present record of respect for international humanitarian law, the recipient's intentions as expressed through formal commitments and the recipient's capacity to ensure that the

[196] The 2019 update of the User's Guide is available at https://www.consilium.europa.eu/media/40659/st12189-en19.pdf.
[197] Emphasis added throughout.

> equipment or technology transferred is used in a manner consistent with international humanitarian law and is not diverted or transferred to other destinations where it might be used for serious violations of this law.
>
> Isolated incidents of international humanitarian law violations are not necessarily indicative of the recipient country's attitude towards international humanitarian law and may not by themselves be considered to constitute a basis for denying an arms transfer. Where a certain pattern of violations can be discerned or the recipient country has not taken appropriate steps to punish violations, this should give cause for serious concern.

108. The application of Criterion 2(c) was considered by the Court of Appeal in in *R (Campaign against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020; [2019] 1 WLR 5765 ("***CAAT 1 CA***"). That case concerned a decision not to suspend export licences of military equipment to Saudi Arabia for use in the conflict in Yemen on the basis that continuing to licence the export of such equipment was compliant with Criterion 2(c). The claimant successfully argued that the Secretary of State had erred in reaching that conclusion: in order properly to assess compliance with Criterion 2(c), it was necessary for the defendant to determine (or at least attempt to determine) whether there was a historic pattern of breaches of IHL by the recipient country (*CAAT 1 CA* at ¶¶132-145). The Secretary of State had failed to make any proper attempt to conduct an assessment of past violations in the context of the war in Yemen and was consequently unable to reach a rational conclusion in relation to Criterion 2(c).

D. DEPARTURE FROM POLICY

109. Public law requires that policies must, in the absence of a good reason for departure, be followed: *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at ¶68; *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 at ¶26; *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546 at ¶¶29-31. The applicable principles are developed under Ground 12 below.

E. SECTION 31(2A) SENIOR COURTS ACT 1981

110. The SSBT relies upon ss.31(2A) and (3C) of the Senior Courts Act 1981 in relation to Grounds 12 and 13. Further, in respect of Ground 8 the Defendant advances several arguments which (properly assessed) can avail him only via s.31(2A).

111. Section 31(2A) provides (relevantly) that the Court *"must refuse to grant relief on an application for judicial review* [...] *if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred*".

112. In applying s.31(2A), the following principles are relevant:[198]

112.1. The Court must consider *"the counter-factual world in which the identified unlawful conduct by the public authority is assumed not to have occurred"*: *R (Public and Commercial Services Union) v Minister for the Cabinet Office* [2017] EWHC 1787 (Admin), [2018] ICR 269, ¶89.

112.2. The counter-factual should proceed on the basis that the public authority would have complied with other relevant principles of public law: see e.g. *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin) [2019] 1 WLR 1649, ¶141;[199] *R (S) v Camden LBC* [2018] EWHC 3354 (Admin), ¶82, 85.[200]

112.3. The burden is on the defendant to show that, in this counter-factual scenario, it is highly likely that the outcome for the applicant would not have been substantially different: see e.g. *R (Bokrosova) v Lambeth LBC* [2015] EWHC 3386 (Admin), [2016] PTSR 355, ¶88.

112.4. The Court will normally expect the public authority to support its reliance on s.31(2A) with evidence, the absence of which may be *"telling"*: *R (Harvey) v Mendip District Council* [2017] EWCA Civ 1784, ¶47;[201] *R (Enfield) v Secretary of State for Transport* [2015] EWHC 3758 (Admin), ¶106.[202]

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[198] See also the more extensive summary in *R (Coulthard) v Secretary of State for the Environment, Food and Rural Affairs* [2024] EWHC 3252 (Admin), ¶¶93-94.

[199] Where the error made out involved failure to disclose certain analysis to consultees, the Court – in examining the counter-factual for the purposes of s.31(2A) – assumed not only that the analysis would have been disclosed, but that the defendant would have approached consultees' responses to it with an open mind, this being *"one of the requirements of proper consultation"*.

[200] Where the error made out involved failure to discharge a statutory obligation to consult, the Court — in examining the counter-factual for the purposes of s.31(2A) — assumed not only that consultation would have occurred but that the defendant would have been *"prepared to listen and to apply the principles behind [the relevant Act]"*, and would have *"complied with both the letter and the spirit of the Act, Regulations and Code of Practice."*

[201] See also *PCSU*, ¶¶90-91, treating evidence provided by someone who had not been involved in the decision under challenge as *"an exercise in speculation about how things might have worked out if no unlawfulness had occurred"*, which fell to be approached with *"a degree of scepticism"*.

[202] Reversed in part on appeal; this statement was not disapproved and was recently cited with approval in *Coulthard* (above).

112.5. The threshold is a high one, falling somewhere between the civil and criminal standards: *R (Adamson) v Kirklees Metropolitan Borough Council* [2019] EWHC 1129 (Admin) (at ¶142); *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [2020] PTSR 1446, ¶273. It requires "*a high degree of confidence that the relief* [...] *would not alter the outcome"*: *R (Glencore Energy UK Ltd) v HMRC* [2017] EWHC 1476 (Admin) (at ¶120)

112.6. Absent sufficient evidence, the Court should remain mindful of the risk of *"straying, even subconsciously, into the forbidden territory of assessing the merits"* (*Plan B Earth*, ¶273) and of engaging in speculation about the outcome of primary decisions entrusted to others (see e.g. *R (Davison) v Elmbridge Borough Council* [2019] EWHC 1409 (Admin), ¶71).

113. The result is that, if there has been an error of law in a decision-making process, "*it will often be difficult or impossible for a court to conclude that it is 'highly likely' that the outcome would not have been 'substantially different' if the executive had gone about the decision-making process in accordance with the law*": *Plan B Earth*, ¶273.

V. THE INTERNATIONAL LEGAL FRAMEWORK

114. The UK's international obligations relevant to the export of arms are addressed in detail under Grounds 8(A)-(D) below. As set out there, the rules relevant to the present claim are:

114.1. the duty to respect and ensure respect for the Geneva Conventions under Common Article 1 of the Geneva Conventions and the First Additional Protocol ("**CA1**");

114.2. Articles 6 and 7 of the Arms Trade Treaty (the "**ATT**");

114.3. the duty to prevent genocide under Article I of the Genocide Convention; and

114.4. the customary international law duties, codified in the ASR, not to aid or assist in the commission of an internationally wrongful act nor to render aid or assistance in maintaining a situation created by a serious breach of a peremptory norm of international law.

A. COMMON ARTICLE 1 OF THE GENEVA CONVENTIONS

115. The primary rules of IHL are set out in the Four Geneva Conventions of 1949, ratified by the United Kingdom on 29 September 1957, and in their optional protocols: see the summary of the basic rules of IHL in *CAAT1 CA* at ¶¶23-25.

116. CA1 provides:

> The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

117. In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)* I.C.J. Reports 1986, p. 392, the ICJ held (at ¶220):

> The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in all circumstances", since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions.

118. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, I.C.J. Reports 2004, p. 136 ("**2004 oPT Advisory Opinion**"), the ICJ held as follows:

> 158. The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.
>
> 159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United

> Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

119. To similar effect, the Court has held that "*all the States Parties to the Fourth Geneva Convention have the obligation, while respecting the Charter of the United Nations and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention"* (oPT Second Advisory Opinion ¶279).[203]

120. In *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany) (Provisional Measures*) of 30 April 2024, the ICJ confirmed the relevance of CA1 specifically in relation to the transfer of arms to Israel:

> The Court recalls that, pursuant to common Article 1 of the Geneva Conventions, all States parties are under an obligation 'to respect and to ensure respect' for the Conventions 'in all circumstances'. It follows from that provision that every State party to these Conventions, 'whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with' … Such an obligation 'does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression' […]
>
> Moreover, the Court considers it particularly important to remind all States of their international obligations relating to the transfer of arms to parties to an armed conflict, in order to avoid the risk that such arms might be used to violate the above-mentioned Conventions. All these obligations are incumbent upon Germany as a State party to the said Conventions in its supply of arms to Israel."[204] (emphasis added)

121. The separate rulings in the *Nicaragua v. Germany* case relevantly provide as follows:

> 1. […] there remains a duty on Germany, and indeed other States, to be vigilant and exercise due diligence in connection with any provision of military aid to Israel in the face of what might be serious breaches of international humanitarian law and possibly even genocide . . . given these proceedings and the reminder by the Court to States, in particular Germany, of "their international obligations relating to the transfer of arms", under current circumstances, it would hardly be open to Germany in the future to argue that it was not aware of the risks […]

[203] See also UNGA Res on the *oPT Second Advisory Opinion*, UN Doc. A/ES-10/L.31/Rev.1, 18 September 2024, ¶12, calling on States Parties to the Fourth Geneva Convention "*to enforce the Convention*" in the oPT "*and to ensure respect thereto in accordance with common article 1 of the four Geneva Conventions*."

[204] *Nicaragua v. Germany Order*, ¶¶23-24 (emphasis added). The Claimant does not understand the Defendant's statement at ADGR ¶26(c)(iii) that ¶24 "*did not refer to CA1*" in circumstances where it referred to "*the above-mentioned Conventions*", which is a direct reference to the preceding [23] in which "*common Article 1 of the Geneva Conventions*" is mentioned in terms.

> 4. The takeaway from all of this is that Germany, being aware of its obligations under international law, will exercise due diligence consistent with that obligation, as well as under its domestic legislative framework, to ensure that no transfer of military equipment contributes to breaches of either the Geneva Conventions or the Genocide Convention […]
>
> 13. the current Order makes plain that it expects Germany, and other States supplying weapons to Israel, to exercise due diligence and ensure that weapons transferred to Israel are not used in the commission of acts of genocide or breaches of international humanitarian law. For me this is not a hollow statement but a statement with real legal significance. In particular, in the consideration of the responsibility of Germany, or any other State, for breaches of either the Genocide Convention or international humanitarian law, including responsibility for not taking appropriate measures in the face of a risk of such breaches, the effect of this Order would be to remove any plausible deniability of knowledge of the risk. (Judge Tladi) [205]
> […]
> 8. In the context of military assistance, the obligations to prevent under Article 1 of the Geneva Conventions and the Genocide Convention necessarily impose a duty on States parties to be proactive in ascertaining and avoiding "the risk that such arms might be used to violate the […] Conventions […]
>
> 13. Of course, for a State to comply with the obligations to prevent under Article 1 of the Geneva and Genocide Conventions, its legal framework must function properly in practice." (Judge Cleveland)[206]

122. A number of the obligations imposed by IHL, which the UK is obliged by CA1 to "*ensure respect for*", are set out at ASFG ¶¶102-104 [CB/A/2/65-72].

B. THE ARMS TRADE TREATY OF 2014

123. The ATT regulates the international trade in conventional arms and establishes international standards governing arms transfers. It was ratified by the UK on 2 April 2014. It provides relevantly as follows:

> **Preamble**
> […] "Acknowledging that peace and security, development and human rights are pillars of the United Nations system and foundations for collective security and recognizing that development, peace and security and human rights are interlinked and mutually reinforcing…"
>
> **Article 1**
> The object of this Treaty is to:

[205] *Nicaragua v. Germany Order*, Separate Opinion of Judge Tladi, ¶¶1, 4, 13.
[206] *Nicaragua v. Germany Order*, Separate Opinion of Judge Cleveland, ¶¶8 and 13.

Establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms; . . .
for the purpose of:

> Contributing to international and regional peace, security and stability;
> Reducing human suffering;
> Promoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties.

Article 5(1)
Each State Party shall implement this Treaty in a consistent, objective and non-discriminatory manner, bearing in mind the principles referred to in this Treaty.

Article 6
1. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes.
2. A State Party shall not authorize any transfer of conventional arms covered under Article 2(1) or of items covered under Article 3 or Article 4, *if the transfer would violate its relevant international obligations under international agreements to which it is a Party*, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.
3. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.

Article 7
1. If the export is not prohibited under Article 6, each exporting State Party, prior to authorization of the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, under its jurisdiction and pursuant to its national control system, shall, in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State in accordance with Article 8 (1), assess the potential that the conventional arms or items:

> (a) would contribute to or undermine peace and security;
> (b) could be used to:
>
> > (i) commit or facilitate a serious violation of international humanitarian law;
> > (ii) commit or facilitate a serious violation of international human rights law;

(iii) commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or
(iv) commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.

2. The exporting State Party shall also consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b) in paragraph 1, such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States.
3. If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export.
4. The exporting State Party, in making this assessment, shall take into account the risk of the conventional arms covered under Article 2 (1) or of the items covered under Article 3 or Article 4 being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children. […]"

Article 8
(1) Each importing State Party shall take measures to ensure that appropriate and relevant information is provided, upon request, pursuant to its national laws, to the exporting State Party, to assist the exporting State Party in conducting its national export assessment under Article 7. Such measures may include end use or end user documentation….

Article 26(1)
The implementation of this Treaty shall not prejudice obligations undertaken by States Parties with regard to existing or future international agreements, to which they are parties, where those obligations are consistent with this Treaty.

C. CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE IN 1948

124. The UK acceded to the Genocide Convention on 30 January 1970. Article I provides:

> The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

125. Under Article II, any of the following acts, committed "*with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such*", constitute genocide:

> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

126. The ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment)* I.C.J. Reports 2007, p. 43 ("***Bosnia Genocide***") described the obligation to prevent genocide under Article I of the Convention as follows:[207]

> 427. […] The obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope, which extends beyond the particular case envisaged in Article VIII, namely reference to the competent organs of the United Nations, for them to take such action as they deem appropriate. Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs.
>
> [...]
> 430. it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of "due diligence", which calls for an assessment in concreto, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. . . . On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question

[207] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, 222.

> 431. Thirdly, a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. […] This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (dolus specialis), it is under a duty to make such use of these means as the circumstances permit.

127. Article IX provides for the compulsory jurisdiction of the Court:

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

128. The obligation to prevent genocide applies *erga omnes*, as the ICJ confirmed in *Gambia v. Myanmar*:[208]

> The common interest in compliance with the relevant obligations under the Genocide Convention entails that any State party, without distinction, is entitled to invoke the responsibility of another State party for an alleged breach of its obligations erga omnes partes. Responsibility for an alleged breach of obligations erga omnes partes under the Genocide Convention may be invoked through the institution of proceedings before the Court, regardless of whether a special interest can be demonstrated. If a special interest were required for that purpose, in many situations no State would be in a position to make a claim.

129. The ICJ has ordered a number of provisional measures under the Genocide Convention in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*. Provisional measures are binding, and their breach constitutes an internationally wrongful act.[209]

130. On 26 January 2024, the ICJ handed down the first provisional order in *South Africa v Israel*. The Court determined, *inter alia*:

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[208] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar: 7 States intervening), Preliminary Objections*, ¶108

[209] *La Grand case (Germany v. United States of America)* [2001] ICJ Rep 466, 506 ¶¶109-110; *Bosnia Genocide*, ¶¶456, 458.

> the facts and circumstances mentioned above are sufficient to conclude that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible. This is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III;[210]
>
> [...] the Court considers that there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights found by the Court to be plausible, before it gives its final decision[211]
>
> [...] It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by South Africa that the Court has found to be plausible[212]
>
> [...] [Israel must, inter alia] take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention… ensure with immediate effect that its military does not commit any acts [under Article II of the Convention]… take all measures within its power to prevent and punish the direct and public incitement to commit genocide… take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip… take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts.[213]

131. On 28 March 2024, the ICJ reaffirmed its previous finding of the right of Palestinians not to be subjected to genocide,[214] and found that the situation inflicted by Israel in Gaza "*entails a further risk of irreparable prejudice*" to those rights.[215] It reaffirmed the prior provisional measures in its 26 January 2024 order, and additionally found it necessary to make a further order "*in conformity with* [Israel's] *obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, and in view of the worsening conditions of life faced by Palestinians in Gaza, in particular the spread of famine and starvation*" requiring Israel to:[216]

> Take all necessary and effective measures to ensure, without delay, in full co-operation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including by increasing the capacity and

[210] *South Africa v Israel*, Order of 26 January 2024, ¶54.
[211] *South Africa v Israel*, Order of 26 January 2024, ¶74.
[212] *South Africa v Israel*, Order of 26 January 2024, ¶75.
[213] *South Africa v Israel*, Order of 26 January 2024, ¶86.
[214] *South Africa v Israel*, Order of 28 March 2024, ¶25.
[215] *South Africa v Israel*, Order of 28 March 2024, ¶25.
[216] *South Africa v Israel*, Order of 28 March 2024, ¶45.

> number of land crossing points and maintaining them open for as long as necessary
>
> [...] Ensure with immediate effect that its military does not commit acts which constitute a violation of any of the rights of the Palestinians in Gaza as a protected group under the Convention on the Prevention and Punishment of the Crime of Genocide, including by preventing, through any action, the delivery of urgently needed humanitarian assistance.

132. On 24 May 2024, the ICJ reaffirmed its previous finding of the right of Palestinians not to be subjected to genocide,[217] and found that the situation "*entails a further risk of irreparable prejudice*" to those rights.[218] It reaffirmed the prior provisional measures in its 26 January 2024 and 28 March 2024 orders, and found it "*necessary*" to order that Israel, "i*n conformity with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, and in view of the worsening conditions of life faced by civilians in the Rafah Governorate*":[219]

> Immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part [...]
>
> Maintain open the Rafah crossing for unhindered provision at scale of urgently needed basic services and humanitarian assistance.

D. ARTICLES ON STATE RESPONSIBILITY

133. The ASR are widely considered to *"represent the modern framework on state responsibility*".[220] Part 1, Chapter I of the ASR sets out general principles, which include:

> Article 1
> *Responsibility of a State for its internationally wrongful acts*
> Every internationally wrongful act of a State entails the international responsibility of that State.
>
> Article 2
> *Elements of an internationally wrongful act of a State*
> There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.
>
> Article 3
> *Characterization of an act of a State as internationally wrongful*

[217] South Africa v. Israel, Order of 24 May 2024, ¶32.
[218] South Africa v. Israel, Order of 24 May 2024, ¶47.
[219] South Africa v Israel, Order of 24 May 2024, ¶57.
[220] See *Crawford, State Responsibility: The General Part,* 2014; §2.1.1, p.45. See further below under Ground 9.

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

134. Part 1, Chapter III sets out the framework on breach of an international obligation, including Article 12, which provides:

Existence of a breach of an international obligation
There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

135. Part 1, Chapter IV considers responsibility of a state in connection with the act of another state, including:

Article 16
Aid or assistance in the commission of an internationally wrongful act
A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
(b) the act would be internationally wrongful if committed by that State.

136. Part 2, Chapter III (Articles 40-41) of the ASR deals with breaches of peremptory norms as follows:

Article 40
Application of this chapter
1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41
Particular consequences of a serious breach of an obligation under this chapter
1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

E. VIENNA CONVENTION ON THE LAW OF TREATIES 1969

137. The parties dispute the proper interpretation of the obligations imposed under the treaties referred to above. The principles governing that dispute are provided at Articles 31(1) and 32 of the Vienna Convention on the law of Treaties ("**VCLT**"), which reflect customary international law.[221]

> Article 31
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose [...]
>
> Article 32
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

138. Article 53 of the VCLT defines peremptory norms of international law as follows:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[222]

[221] See, for example, the decision of the ICJ in *The Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* ICJ Reports 1997, p7, ¶46. See also *A v SSHD (No. 2)* [2006] 2 AC 221 at ¶29 per Lord Bingham.

[222] See also *Prosecutor v. Furundzija*, trial judgment, wherein the ICTY took the view that the legal effect of violation of a jus cogens norm also invalidated intra-state measures (¶155, references removed): "*The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act*."

139. Peremptory norms of international law include:[223] (i) the prohibition of aggression; (ii) the prohibition of genocide;[224] (iii) the prohibition of crimes against humanity; (iv) the basic rules of international humanitarian law; (v) the prohibition of racial discrimination and apartheid; (vi) the prohibition of torture; and (vii) the right of self-determination.[225]

VI. GROUND 8: ERROR IN THE SSBT'S ASSESSMENT AS TO THE COMPATIBILITY OF THE F-35 CARVE OUT WITH THE UK'S OBLIGATIONS UNDER INTERNATIONAL LAW

A. JUSTICIABILITY

140. In deciding on the F-35 Carve Out, the SSBT proceeded on the basis of:

140.1. **First**, his prior assessment that the continued transfer of arms to Israel was compatible with Criterion 1 of the SELC, and thus with the UK's international law obligations given effect by that criterion (see ¶78 above); and

140.2. **Second and in consequence**, his self-direction that the F-35 Carve Out was compatible with the UK's international law obligations.

141. In making his assessment that the F-35 Carve Out was consistent with the UK's international obligations, the SSBT misunderstood and misapplied relevant rules of international law. Those errors are the subject Grounds 8(A)-(D) below. The SSBT contends that the issues raised by Ground 8 are not justiciable. That is wrong, for the reasons set out below.

(i) Domestic Law Foothold

142. The treaty obligations relied upon by the Claimant have not been incorporated into domestic law. The SSBT says that, because of this, Grounds 8(A)-(D) are not justiciable: ADGR¶¶12-14 [CB/A/3/139-140]. There is, the SSBT says, no "*domestic law foothold*" for this part of the Claimant's challenge.

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[223] See ILC, Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf.
[224] See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)* [2006] ICJ Rep 6, ¶64: it is "assuredly" a peremptory norm. The ICJ in *Bosnia Genocide* has additionally held that the obligation "*to prevent genocide is both normative and compelling*" (at ¶427).
[225] See also ICJ in 2024 oPt Advisory opinion ¶233: *"in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law"*.

143. There are two problems with this argument.[226] **First**, it is predicated on a factual mischaracterisation of the F-35 Carve Out. It characterises that Carve Out as involving a departure from the SELC as a whole, when in reality it involved a departure only from Criterion 2(c) and was expressly predicated on compliance with Criterion 1. **Second**, it is contrary to authority as to the justiciability of self-directions regarding compliance with international legal obligations. Properly analysed, the continued applicability of Criterion 1 and the SSBT's self-direction each provide a domestic "*foothold*" for adjudication on the international obligations which underpin Ground 8.

(1) Criterion 1

144. A first domestic "*foothold*" for the relevant obligations is supplied by the SSBT's own policy, in the form of Criterion 1 of the SELC.

145. As set out at ¶78 above, the SSBT proceeded on the basis that the export of military equipment to Israel was compatible with Criterion 1 of the SELC, and hence with "*respect for the UK's international obligations*". This includes obligations under the ATT (which is expressly referenced in Criterion 1) and other international instruments to which the UK is a party.[227] Accordingly, in making the F-35 Carve Out, the SSBT did not purport to depart from Criterion 1. To the contrary — he approached the F-35 Carve Out on the basis that the continued export of F-35 parts would comply with it. As noted above, the express purpose of the SELC — consistent with the focus of the underlying statutory scheme (as to which see further below) — was to secure compliance with the UK's international obligations.

146. The courts have consistently recognised that, where policy guidance is promulgated with the intention of giving effect to an international legal obligation, an examination of whether the defendant complied with that policy may well require consideration of the international law obligation given effect. Such a question is justiciable. As Linden J explained in *R. (on the application of KTT) v Secretary of State for the Home Department* [2021] EWHC 2722 (Admin); [2022] 1 WLR 1312 ("***KTT***") at ¶36, following a detailed examination of the caselaw:

[226] Leaving aside, for the moment, the more fundamental point that the Claimant relies upon rules of customary international law which have been received into the common law (the subject of Ground 9).
[227] Article 6(2) of the ATT provides that a State Party shall not authorise the transfer of arms if such transfer "*would violate its relevant international obligations under international agreements to which it is a party*". This includes obligations under the Geneva Conventions and the Genocide Convention.

146.1. the source of the public law obligation contended for in such a case is not international law, but rather the declared policy; and

146.2. if the defendant's policy requires compliance with an obligation under international law, it is "*permissible for the court, applying conventional public law principles, to consider what the requirements of those articles were with a view to deciding whether the policy correctly stated their effect and whether a given decision, taken in accordance with that policy, was lawful*", even if the international law provision has not been incorporated into domestic law (emphasis added).

147. In reaching those conclusions, Linden J analysed the judgment of Lord Reed in *R. (on the application of SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223 ("***SC***"). He explained at ¶¶48-49 (emphasis added):

> Lord Reed was not suggesting that it is never permissible to interpret an international treaty, or to consider whether a given act or decision is consistent with the terms of a treaty, absent legislative incorporation. Nor would it have been consistent with [*JH Rayner (Mincing Lane) Limited v Department for Trade and Industry* [1990] AC 2 AC 418 ("*Rayner*")] or subsequent cases on the status of international treaties for him to do so… his point was that the issue for the Court in *SC* was "justification" under Article 14 ECHR, and that there was no basis in law or in fact for equating this issue with the question whether the introduction of the measure in question was or was not consistent with the obligations of the United Kingdom under the UNCRC. Such an approach would give direct effect to an unincorporated treaty and was therefore impermissible.
>
> It is also worth noting that *SC* was concerned with the approach to the question of justification under Article 14 ECHR in the case law of the European Court of Human Rights, and the relationship between that issue and the UNCRC. The Supreme Court therefore was not considering the question addressed in the [*R. (on the application of PK (Ghana)) v Secretary of State for the Home Department* [2018] EWCA Civ 98; [2018] 1 W.L.R. 3955 ("*PK (Ghana)*")] line of cases as to the compatibility with *Rayner* principles of considering the meaning and effect of an unincorporated treaty where a public body has committed itself in a published policy document to make a given decision in accordance with the terms of that treaty. As I have said, in such a case the source of the alleged obligation is the policy statement rather than the treaty itself: there is a basis for equating the issue of compatibility with the relevant international treaty obligation with the issue in the case. There is no "passporting" and the relevant articles of the treaty are not given direct effect. There therefore does not appear to me to be any inconsistency between the *PK (Ghana)* line of cases and *SC.*

148. Linden J's reasoning was endorsed by the Court of Appeal in *R. (on the application of EOG) v Secretary of State for the Home Department* [2022] EWCA Civ 307; [2023] QB 351 at ¶34.

149. The principle established in that line of authority is directly applicable here. Indeed, it applies even more forcefully. Not only were the SELC (with Criterion 1 of which the SSBT purported to comply in respect of the F-35 Carve Out), like the guidance considered in ***KTT*** and ***EOG***, adopted for the express purpose of giving effect to the UK's relevant international law obligations, but this purpose is central to the underlying statutory scheme.

150. As set out in Section IV above, the SSBT's powers to make licensing decisions derive from the 2002 Act. International law is central to the operation of the regime established pursuant to the 2002 Act. Thus:

150.1. The power to grant and suspend licenses for the export of military equipment derives from the 2008 Order (see 78¶¶7899-102 above). That Order was made pursuant to s.5(2) of the 2002 Act, which empowers the SSBT to impose export controls for the express purpose of "*giving effect to any* [...] *international obligation of the United Kingdom*".

150.2. The 2002 Act also required the SSBT to adopt guidance to explain how powers made under the 2008 Order would be exercised in relation to licensing decisions: s.9(3). The SSBT was required to address in that guidance the consideration to be given to, *inter alia*, the possibility that exported material might be used in contravention of IHL, in internal repression or in breaches of human rights law: s.9(4) and para 3(2), Schedule 1. The SELC were adopted pursuant to this obligation.

150.3. Parliament has therefore: (i) empowered the SSBT to impose export controls for the purposes of giving effect to the UK's international obligations; and (ii) required the SSBT to introduce guidance which identifies the consideration to be given to IHL and international human rights law ("**IHRL**"**)** in relation to the exercise of that power.

150.4. It is in this context that the SELC were expressly adopted as "*one of the means*" by which the Government has sought to implement the UK's international legal commitments.

151. The legislative history to the 2002 Act underscores the centrality of international law to the scheme:

151.1. Prior to the entry into force of the 2002 Act, export control was governed by the Import, Export and Customs Powers (Defence) Act of 1939 (the "**1939 Act**"). The 1939 Act made no reference to international law (perhaps unsurprisingly, as it pre-dated the first international export control regime: the Coordinating Committee for Multilateral Export Controls, 1949).

151.2. By 1998, however, the EU had adopted a number of measures aimed at harmonising arms exports across Member States and ensuring compatibility with international law. Between 1991 and 1992 the European Community adopted common criteria to be applied to arms exports. The first of those criteria was "*respect for the International Commitments of the Member States of the Community*". The second criterion was "*the respect of human rights in the country of final destination*".[228] Those criteria were developed further in 1998, when the EU adopted a Code of Conduct on Arms Exports, which similarly included reference in its first criterion to the international obligations of member states.

151.3. The 2002 Act, and in particular the obligation under s.9(4) and the table in para 3 of Schedule 1, mirror the position under EU law at the relevant time. The evident purpose of those provisions was to ensure that the UK's export control regime was compatible with EU and international law.

152. There is therefore a clear domestic law foothold for the international law issues raised by Ground 8 in the form of the SSBT's assessment of compliance with Criterion 1 of the SELC. As in *KTT* and *EOG*, the Claimant's challenge to the F-35 Carve Out on the basis of errors in this assessment is — subject to the matters discussed in subsections 2 and 3 below — justiciable on ordinary public law principles.

(2) The Launder principle

153. A second domestic foothold can be found in the SSBT's express self-direction as to the compliance of the F-35 Carve Out with the UK's international obligations.

154. In light of that self-direction, the SSBT's justiciability challenge is impossible to reconcile with the judgments of the House of Lords in *R v SSHD ex parte Launder*

[228] See e.g. http://www.statewatch.org/news/2002/jan/hh.pdf.

[1997] 1 WLR 839 (HL) and *R v Director of Public Prosecutions ex parte Kebilene* [2002] AC 326.

155. *Launder* was a challenge to the decision of the Secretary of State for the Home Department to extradite the claimant to Hong Kong shortly before the transfer of sovereignty over Hong Kong to the People's Republic of China. The claimant challenged the Secretary of State's assessment that his extradition was compatible with the ECHR (p. 867C). The Convention was, at that time, an unincorporated treaty. The Divisional Court had held that it could not be relied upon for that reason. The House of Lords disagreed. Lord Hope held at p.867F (emphasis added):

> If the applicant is to have an effective remedy against a decision which is flawed because the decision-maker has misdirected himself on the Convention which he himself says he took into account, it must surely be right to examine the substance of the argument. The ordinary principles of judicial review permit this approach because it was to the rationality and legality of the decisions, and not to some independent remedy, that Mr. Vaughan directed his argument.

156. *Kebilene* was a challenge to a decision by the Director of Public Prosecutions to proceed with the prosecution of the claimants under anti-terrorism legislation notwithstanding a decision by the judge presiding over their trial that the provision under which they had been prosecuted was inconsistent with Article 6 of the ECHR. The Divisional Court (Lord Bingham CJ, Laws LJ and Sullivan J) granted a declaration that the prosecution was unlawful. In reaching that decision, Lord Bingham CJ applied *Launder* and held at p.341E-342C:

> It is plain as a matter of fact that the Director did wish to know where he stood, since he would not otherwise have sought the advice of Mr. Singh. It is, therefore, as it seems to me, appropriate for this court to review the soundness of the legal advice on which the Director has made clear, publicly, that he relied; for if the legal advice he relied on was unsound he should, in the public interest, have the opportunity to reconsider the confirmation of his consent on a sound legal basis. This approach is in my judgment consistent with that of Lord Hope of Craighead (with whom the other members of the House agreed) in *Reg. v. Secretary of State for tire Home Department, Ex parte Launder* [1997] 1 W.L.R. 839, 867…
>
> In offering such guidance as it can on the true effect of the Convention, the court does not in my view usurp the legislative responsibility of Parliament nor the independent decision-making responsibility of the Director, so long as it leaves the final decision to him.

157. Laws LJ came to a similar conclusion at p.352H, before going on to consider the Director's submission that the Court's consideration of the meaning of the Convention was precluded by the judgment of the House of Lords in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, a case on which the SSBT relies at ADGR ¶10 [CB/A/3/139]. Laws LJ rejected that submission:

> It follows with respect that Mr. Pannick's reliance on *J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry* [1990] 2 A.C. 418, *Reg. v. Secretary of State for the Home Department, Ex parte Brind* [1991] 1 A.C. 696 and *Reg. v. Ministry of Defence, Ex parte Smith* [1996] Q.B. 517 is misplaced. The underlying proposition to which his citations from these authorities were in truth directed is that it is impermissible for the courts to require obedience to the Convention in the making of public decisions, for that would amount to incorporation, as it has been put, "by the back door." But the reasons I have given to demonstrate that in this case the court should decide the issue of incompatibility (or otherwise) with article 6(2) involves no question of incorporation, by the back or any other door. They show only that the events which have happened, starting with the enactment of the Act of 1998, give rise to a particular state of affairs in consequence of which the law requires the Director to resolve that issue correctly, so that he is amenable to judicial review if he does not. These conclusions flow, in my judgment, from the application of well established public law principles. In this case I think the arguments on either side have been mesmerised by the role within them of the Convention.

158. The Director challenged those conclusions on appeal to the House of Lords. Although the appeal was allowed on other grounds, the House of Lords rejected the challenge to the Divisional Court's reliance on and analysis of *Launder*. Lord Steyn, with whom Lord Slynn and Lord Cooke agreed, held (at p. 367D-F):

> Nevertheless, the Attorney-General and Mr. Pannick strenuously argued before the House that the judgment of the Divisional Court is in conflict with the principle of parliamentary sovereignty in the context of unambiguous primary legislation, viz. section 16A. They submitted that the effect of the judgment was to invite the Director to disapply primary legislation. In my view this argument is mistaken and fails to do justice to the reasoning of the Divisional Court. Lord Bingham of Cornhill C.J. pointed out that in the present case the Director wished to know where he stood on the issue of compatibility of the legislation. The Director sought and relied on legal advice on that issue. Lord Bingham of Cornhill C.J. said that if the advice was wrong, the Director should have the opportunity to reconsider the confirmation of his advice on a sound legal basis. As Lord Bingham of Cornhill C.J. observed, at p. 341E-F, this approach is consistent with the judgment of Lord Hope of Craighead in *Reg. v. Secretary of State for the Home Department, Ex parte Launder* [1997] 1 W.L.R. 839, 867. In that case Lord Hope observed:

> "If the applicant is to have an effective remedy against a decision [on extradition] which is flawed because the decision-maker has misdirected himself on the Convention which he himself says he took into account, it must surely be right to examine the substance of the argument."

I respectfully agree. There was no infringement of the principle of parliamentary sovereignty. I would reject this argument of the Director.

159. The SSBT contends that Launder and Kebilene "*represent, at most, highly circumscribed exceptions*" to the general principle that domestic courts lack jurisdiction to construe or apply treaties which have not been incorporated into national law, such that they must be confined to their particular facts: ADGR ¶12 [CB/A/3/139].

160. That contention is without merit. There is nothing in the judgments of Launder and Kebilene to support the SSBT's narrow reading of the legal principle which they establish. To the contrary, the passages summarised above are expressed in broad terms, and the principles are of general application. This is how they have been understood by subsequent courts. Thus, and by way of example:

160.1. In R (Barclay) v Lord Chancellor [2010] 1 AC 464, the Supreme Court proceeded on the basis of a concession by the Lord Chancellor as to the justiciability of the claimant's challenge to the compatibility of the Reform (Sark) Law 2008 with the Convention, which made it unnecessary for the Supreme Court to determine whether the HRA 1998 extended to Sark.

160.2. In R (Tag Eldin Ramadan Bashir) v SSHD [2018] UKSC 45, the Supreme Court referred without criticism to the judgment of Foskett J at first instance to the effect that *"a failure by the Secretary of State correctly to apply the [Refugee] Convention may have consequences in domestic public law, as under the so-called "Launder principle*"" (¶7). The Court identified the *Launder* principle as a matter requiring further consideration following the delivery of its "interim judgment" in that case (¶114).

160.3. In Heathrow Airport Limited v HMT [2021] EWCA Civ 783, the Court of Appeal held that the issue of whether a government decision was consistent with the General Agreement on Tariffs and Trade 1994 was justiciable, referring to Launder at ¶¶150-151 and Kebilene at ¶152. There was a foothold on the facts for a number of reasons,

the first being that "*the Government evinced a firm intention to adhere to the GATT*" in relation to the relevant decision (see ¶170).

161. The SSBT further contends (at ADGR ¶12 [CB/A/3/139]) that *Launder* does not establish a general rule that "*if the Executive considers the UK's unincorporated international obligations as part of its decision making, that opens up the door to the courts interpreting or applying those obligations in order to police a public law obligation*". However, the Claimant does not contend that the *Launder* principle applies in all cases where an unincorporated international obligation has been "*considered*" (in whatever manner and to whatever extent) as part of a public authority's decision-making. Rather, it applies in relation to decisions which are premised on a self-direction that the outcome is consistent with the relevant international obligation. In *Kebilene*, Laws LJ expressly rejected the argument that this represented an impermissible "*opening of the door*".

162. Further, the House of Lords' judgment in *R (Corner House) v Director of the Serious Fraud Office* [2009] 1 AC 756 makes clear that a self-direction will not give rise to a justiciable question of the proper interpretation of an international obligation if the direction was immaterial to the decision. This is the effect of the judgments of Lord Bingham (¶47) and Lord Brown (¶66).

163. That is not the case here. It is common ground that the compatibility of the F-35 Carve Out with the UK's international obligations was a matter to which the SSBT had regard as a matter of fact. Given the nature of the decision and the legal context in which it was made, there is no basis for any assumption that the SSBT would have reached the same decision irrespective of his conclusion as to its compatibility with international law, such that the self-direction could be regarded as immaterial.

(ii) High Policy

164. The SSBT separately contends that Ground 8 is not justiciable because it "*trespasses onto 'matters of high policy', namely the conduct of foreign affairs and compliance with international law*": ADGR ¶15 [CB/A/3/140-141].

165. This objection is without merit. Ground 8 is not a challenge to the UK's conduct of foreign policy. The suggestion at ADGR ¶15 [CB/A/3/140-141] that the Claimant seeks

to "'*tie the United Kingdom's hands' on the international plane*" is hyperbolic and obviously wrong.

166. Instead, as set out above, the Claimant challenges the application of the SSBT's own guidance and self-direction in relation to international law with respect to a specific licensing decision. For reasons already given, these are justiciable (and, thus, judicial) questions. Ground 8 does not depend for its success upon the Court making any finding that Israel has in fact breached international law.

167. There is no analogy between this claim and *R (on the application of Al Haq) v Secretary of State for Foreign and Commonwealth Affairs*) [2009] EWHC 1910 ("***Al Haq 1***"). The claimant there sought declaratory relief in public law proceedings that a foreign nation was in violation of international law. In refusing permission the Court noted that, in contrast to the cases where the courts have pronounced on matters of high policy, the claimant's application lacked "*a domestic foothold*" (¶54).

168. The same is true of *Campaign for Nuclear Disarmament v Prime Minister* [2002] EWHC 2777 (Admin) ("***CND***"). That claim was "*nakedly an application for an advisory declaration*"[229] about the legality of the UK's invasion of Iraq in the absence of a further resolution from the UN Security Council. The application concerned "*a pure question of interpretation*" of international law[230] in which "*no decision is impugned, neither an existing decision nor even a prospective decision*".[231]

169. In both cases, it was accepted that the Court may be required to determine a matter of "*high policy*" if doing so was necessary to review the legality of a decision as a matter of domestic law: see ¶54 in *Al Haq 1* and *CND* per Simon Brown LJ at ¶¶36 and 47(i), which treated the *Launder* principle as one of general application.

170. In any event, even if a challenge to a decision does trespass into the conduct of foreign affairs and compliance with international law, this does not automatically render the challenge non-justiciable. It is clear from the Supreme Court judgment in *Belhaj v Straw*

[229] Per Simon Brown LJ at ¶15.
[230] *Ibid* at ¶16.
[231] *Ibid* at ¶15.

[2017] AC 964 that whether it does is so is determined by the application of the foreign act of state doctrine, addressed below.

(iii) Foreign Act of State

171. The SSBT contends (at ADGR ¶17 [CB/A/3/141]) that Ground 8 is barred by the foreign act of state doctrine, relying on Lord Neuberger's third rule[232] in *Belhaj v Straw*. This contention is without merit, for six reasons.

172. **First**, the foreign act of state doctrine, including the third rule, only applies where the court will be required to rule on the lawfulness of a foreign state's sovereign acts in order to determine the claim.[233] The Claimant's challenge does not require this Court to make a finding that Israel has breached international law. It requires only a finding that the SSBT misunderstood the UK's international obligations and that this error was material to his decision.[234]

173. **Second**, even in cases where the challenge does require the court to determine the lawfulness of a foreign state's action,[235] the doctrine does not automatically apply. At ¶123 of *Belhaj,* Lord Neuberger made clear that the ambit of doctrine is limited to those categories of act which are "*of such a nature that a municipal judge cannot or ought not rule on it".* This is because the rule is justified "*on the ground that domestic courts should not normally determine issues which are only really appropriate for diplomatic or similar channels"*. The category of foreign acts to which the doctrine applies will therefore "*normally involve some sort of comparatively formal, relatively high level arrangement, but, bearing in mind the nature of the third rule, it would be unwise to be too prescriptive about its ambit*" (at ¶147).[236]

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[232] As explained by the Supreme Court in *"Maduro Board" of the Central Bank of Venezuela v "Guaidó Board" of the Central Bank of Venezuela* [2021] UKSC 57, [2023] AC 156, the *ratio* of *Belhaj v Straw* is to be found in the judgment of Lord Neuberger.

[233] *Belhaj v Straw* at ¶240, quoted in *Law Debenture Trust v Ukraine* [2023] UKSC 11, [2024] AC 411 at ¶188.

[234] Indeed, to the extent that the claim raises issues concerning the commission of war crimes, it is obviously relevant that such crimes are committed by individuals, not States.

[235] Or, as put in the ADGR, whenever a court must "*rule on the lawfulness of a foreign State's conduct*" (at ADGR ¶73 [CB/A/3/160-161]; see also, ADGR ¶17 [CB/A/3/141]).

[236] See also at ¶ 167 where Lord Neuberger declined to apply the third rule as regards Mr Belhaj and Mrs Boudchar because:

> "There is no suggestion that there was some sort of formal or high-level agreement or treaty between any of the states involved which governed the co-operation between the executives of the various countries concerned. As already mentioned, the mere fact that officials of more than one country co-operate to carry out an operation does not mean that the third rule can be invoked if that operation is said to give rise to a claim in domestic law. It would be positively inimical to the rule of law if it were otherwise."

174. The third rule is thus "*based on judicial self-restraint, in that it applies to issues which judges decide that they should abstain from resolving*" (¶151) and must be applied cautiously: "*judges should not be enthusiastic in declining to determine a claim under the third rule*" (¶147). Caution is required because, where the doctrine applies, "*it serves to defeat what would otherwise be a perfectly valid private law claim*" (¶144).

175. The SSBT has failed to identify any basis on which it can be said that Israel's conduct, to the extent that it falls to be considered by this Court, falls within the scope of the "*comparatively formal, relatively high level arrangements*" to which the third rule applies. There is none.

176. **Third**, the Claimant is not asking this Court to "*apply international law to the relations between states [so as to] give rise to private rights or obligations*", to "*subject the sovereign acts of a foreign state to its own rules of municipal law*", or to "*treat [Israel's use of force] as mere private law torts giving rise to civil liabilities for personal injury, trespass, conversion, and the like*": Belhaj v Straw at ¶234 (Lord Sumption), quoted in Law Debenture Trust v Ukraine [2024] AC 411 at ¶188 and at ADGR ¶17 [CB/A/3/141].

177. To the contrary, in the context of Ground 8 the Claimant is asking the Court to consider the lawfulness of a decision of a UK public authority, by reference to its own policy guidance and self-direction. These are issues which an English court can and should resolve.

178. **Fourth**, the decision under challenge is one in which the SSBT has himself, in exercising a power conferred by Parliament for the purposes of (*inter alia*) giving effect to the UK's international obligations, sought to assess Israel's commitment to and compliance with its own international law obligations. Indeed, that is the very essence of the assessment which is required to be carried out under the SELC. The considerations of comity which underpin the doctrine have no role to play in that context, since the UK Government is already expressing a position as to Israel's compliance with its obligations. This is further underscored by the myriad other States, international organisations, international and domestic courts, and NGOs that have

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He also declined to apply the third rule in respect of Mr Rahmatullah even though the United Kingdom and United States were apparently acting pursuant to a Memorandum of Understanding ("**MoU**") because "*the existence and terms of the MoU do not bear on the allegations which are of complicity in unlawful detention and ill-treatment*" (at ¶171).

determined that Israel and/or Israeli officials have breached and/or are at risk of breaching international law in its military offensive in Gaza.[237]

179. **Fifth**, even if the Court were required to rule on the lawfulness of Israel's sovereign acts in order to determine the claim (which, as above, it is not), the foreign act of state doctrine would not apply because any such determination would be incidental — i.e., it is not "*the very subject matter of the action*".[238] As explained above, the subject matter of the action is the lawfulness of a decision of a UK public authority, and the Claimant's challenge does not require this Court to make, nor does the success of Ground 8 require or depend on, a finding that Israel has breached international law.

180. **Sixth**, the doctrine does not apply where the alleged conduct conflicts with fundamental principles of public policy (*Belhaj* at ¶¶153-157, 172), which is almost always the case where the alleged conduct amounts to a breach of a peremptory norm (*Belhaj* at ¶168). This does not mean that a claimant must establish that a peremptory norm has been breached to rely on the public policy exception: the role of international law in this context is to influence the process by which judges identify a domestic principle as

[237] See, for example: (i) the parallel determination by the ICJ that there is "*a real and imminent risk*" of irreparable prejudice to the rights of Palestinians in Gaza not to be subjected to acts of genocide by Israel, and its reminder to "*all States*", having regard to that fact and to the facts on the ground, "*of their international obligations relating to the transfer of arms to parties to an armed conflict, in order to avoid the risk that such arms might be used to violate*" both the Genocide Convention and the Fourth Geneva Convention: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (*South Africa v. Israel*), Provisional Measures, Order of 26 January 2024, ¶¶65-74 and *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory* (*Nicaragua v. Germany*), Request for the Indication of Provisional Measures, Order of 30 April 2024, ¶24; (ii) the assessment by the Office of the Prosecutor of the International Criminal Court: see ICC Prosecutor, "*Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine*" dated 20 May 2024; (iii) the assessment by the United Nations Commission of Inquiry and other determinations of violations of IHL / breaches of the Genocide Convention: see, for example, most recently, UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, 11 September 2024, UN Doc A/79/232, ¶¶89, 91, 94-95, 98, 100, 102, 105, 107-110; (iv) the press release by 37 UN experts voicing concern over "*discernibly genocidal and dehumanising rhetoric coming from senior Israeli government officials*": see, OHCHR press release titled "*Gaza: UN experts call on international community to prevent genocide against the Palestinian people*" dated 16 November 2023; (v) the findings of Amnesty International that Israel is committing genocide against Palestinians in Gaza: see, report titled "*You Feel Like You Are Subhuman: Israel's Genocide Against Palestinians in Gaza*" dated 5 December 2024; and (vi) the findings of Human Rights Watch that Israel is responsible for acts of genocide in Gaza: see, report titled "*Extermination and Acts of Genocide: Israel Deliberately Depriving Palestinians in Gaza of Water*" dated 19 December 2024.

[238] *Belhaj v Straw* at ¶240, quoted in *Law Debenture Trust v Ukraine* [2023] UKSC 11, [2024] AC 411 at ¶188. See also *Belhaj v Straw* at ¶241, quoted in part in *Law Debenture Trust v Ukraine* [2023] UKSC 11, [2024] AC 411 at ¶190:

> "There are many circumstances in which an English court may have occasion to express critical views about the public institutions of another country, without offending against the foreign act of state doctrine or any analogous rule of law. In deportation and extradition cases, for example, it may be necessary to review the evidence disclosing that the person concerned would be tortured or otherwise ill-treated by the authorities in the country to which he would be sent …".

representing a sufficiently fundamental rule of English public policy (*Belhaj* at ¶¶168, 257, 261).

181. Applying the foregoing approach in *Belhaj*, Lord Sumption (whose analysis Lord Neuberger endorsed),[239] considered that it would not be consistent with English public policy to apply the foreign act of state doctrine so as to prevent the court from determining: (i) the allegations of torture or assisting or conniving in torture made against the defendants (at ¶268); and (ii) the allegations of unlawful detention, enforced disappearance and rendition by US and Libyan officials (at ¶¶269-278). Lord Sumption came to this conclusion on the basis that the allegations demonstrated a combination of violations of peremptory norms of international law and inconsistency with fundamental principles of the administration of justice in England (see ¶¶266, 278).

182. The same combination is present in this case:

182.1. Even if, contrary to the above, (i) the resolution of this claim requires the Court to determine (non-incidentally) the lawfulness of Israel's sovereign conduct, and (ii) the relevant conduct falls within the scope of the limited categories of sovereign act to which the doctrine of foreign act of state might otherwise apply, that conduct is in violation of well-established peremptory norms of international law, including the prohibitions on genocide, crimes against humanity, war crimes and torture, as well as the obligation to comply with the basic rules of IHL.[240]

182.2. Having regard to the status of those norms under international law, the alleged conduct is also inconsistent with fundamental principles of justice in England. That is well-established in relation to the prohibition of torture[241] and is obviously also the case in relation to the prohibitions on genocide, crimes against humanity, and war crimes.[242] It follows that, even if the doctrine of foreign act of state might otherwise

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[239] *Belhaj v Straw* at ¶¶168, 172.

[240] See, e.g., ILC, ASR with commentaries, available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, Commentary to Article 40, ¶¶4-5 and Commentary to Article 26, ¶5; ILC, Draft conclusions on identification and legal consequences of peremptory norms of international law, with commentaries, available at https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf, Annex (and in respect of war crimes see Conclusion 22, commentary para. 3); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, ¶79.

[241] *Belhaj* at ¶¶258-262; *A v SSHD (No 2)* [2005] UKHL 71, [2006] 2 AC 221 (at ¶33 *et seq*).

[242] See, e.g., the decision of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v Furundzija*, Case No IT-95-17/T 10 (10 December 1998) at ¶147 noting that the prohibition against torture has a status "*in the international normative system … similar to that of principles such as those prohibiting genocide … the acquisition*

apply to render the claim non-justiciable, the application of that doctrine would not be consistent with English public policy.

183. For these reasons, the foreign act of state doctrine is not engaged. Alternatively, an exception applies due to the nature of the conduct in issue.

B. INTERNATIONAL OBLIGATIONS: CORRECTNESS OR TENABILITY

184. The SSBT's fallback position is that even if Grounds 8(A)-(D) are justiciable, the Court is limited when dealing with them to determining whether the SSBT took a "*tenable view*" of the meaning of the relevant international obligations. This, the SSBT says, is a hard and fast rule which applies wherever a "*Government decision is said to involve a misunderstanding or misinterpretation of unincorporated international law*".

185. No such rule exists. Rather, as the Court of Appeal made clear in *R (Save Stonehenge World Heritage Site Limited) v Secretary of State for Transport* [2024] EWCA Civ 1227, where "*the Government [has] given effect through policy*" to an unincorporated treaty, as mandated by statute, the "*situation [will give] rise to a conventional challenge on established public law grounds to the decision-maker's application of policy*" (¶145), with the court deciding the meaning of the relevant international obligation for itself. Otherwise the proper standard of review in cases alleging misinterpretation of unincorporated international law will *"depend upon the circumstances of the individual case*": ¶146.

186. The tenability standard does not apply in the circumstances of this case. Rather, the Court is required to determine the correct interpretation of the international obligations in issue. This is so for six reasons.

187. **First**, as set out above, compliance with the UK's international obligations is a central concern of the statutory scheme pursuant to which the F-35 Carve Out was made. Parliament has conferred powers on the SSBT under the 2002 Act for the purpose of enabling him to establish and operate an export control regime which gives effect to the UK's international law obligations (s.5(2)) and required that the exercise of those powers involve consideration of the compatibility of export control decisions with the international law of armed conflict and IHRL (s.9(4)). The SSBT's assessment that the

of territory by force and the forcible suppression of the right of peoples to self-determination", cited with approval by Lord Bingham in *A (No 2)* (above) at ¶33.

F-35 Carve Out was consistent with the UK's international obligations was therefore a matter to which Parliament intended that he should have regard. Parliament has placed the UK's international obligations at the heart of the statutory framework under which licensing decisions are made, even if those obligations do not directly govern such decisions.

188. **Secondly**, the SELC has been adopted for the express purpose of giving effect to international law. Applying the principles identified in *KTT*, the Court must determine the actual meaning of relevant international obligations in order to assess whether the SSBT has complied with his policy.

189. **Thirdly,** as in this case the relevant obligations are referred to in the policy itself, this conclusion is only reinforced by the well-settled principle that "*the courts approach to the meaning of policy is to determine it for itself and not ask whether the meaning which the Home Secretary has attributed to it is reasonabl*e": *R (O) v SSHD* [2016] 1 WLR 1717 at ¶28; see also *Mandalia v SSHD* [2015] 1 WLR 4546 at ¶29; *R (Hemmati) v SSHD* [2021] AC 143 at ¶69.

190. **Fourthly**, the SSBT does not dispute that the User's Guide remains relevant to the interpretation and operation of the SELC. The User's Guide provides at para 1.3 that "*in order to avoid conflict with their international obligations, Member States should follow the strictest restrictions that are binding or applicable to them*". This provides a further indication of the centrality of the UK's international obligations to the operation of the statutory regime and tells against the application of a tenability standard.

191. **Fifthly**, in *CAAT I* and *CAAT II* the claimant's challenge that the defendant misdirected himself as to the distinction between two international law concepts relevant to Criterion 2(c) ('serious violation of IHL' and 'grave breaches of IHL') was dealt with applying a correctness standard by the Court of Appeal and the Divisional Court: see *CAAT II* at ¶¶98-103; *CAAT I CA* and ¶¶155-164. The defendant's case in those proceedings was that the issue was whether *"the Secretary of State's decision-making did wrongly elide those concepts"*: ¶[157.

192. **Sixthly**, the balance of the specific circumstances in relation to each of Grounds 8A-D favours the correctness standard in any event. The Court of Appeal summarised a

number of the factors relevant to the appropriate standard in *Stonehenge* at ¶147 as follows:

> Without seeking to lay down an exhaustive or definitive list, one can take from the case law some of the factors that the domestic courts have found significant. Seven considerations emerge: first, any previous case law or guidance on the interpretation of the obligation in question (Lord Bingham in *Corner House* , at [44], and Lord Brown, at [66]; and the judgment of this court in *UKEF* , at [50 (iii)]); second, the effect the interpretation will have on the conduct of international relations (Lord Bingham in *Corner House*, at [44]; and Lord Sumption in *Benkharbouche*, at [35]); third, the availability of other means to derive the interpretation of the obligations in question (Lord Bingham in *Corner House* , at [45]; and Lord Brown, at [65]); fourth, the importance of the interpretation to the operation of the treaty or international obligation (Lord Brown in *Corner House* , at [66]); fifth, the difficulty of interpreting, or ambiguity in the terms of, the obligation (Lord Brown in *Corner House,* at [66]; and Lord Sumption in *Benkharbouche*, at [35]); sixth, the question whether the correct interpretation is necessary to decide a justiciable issue (Lord Sumption in *Benkharbouche*, at [35]); and seventh, the question whether the decision-maker was compelled by domestic law to take into account the obligations in question (the judgment of this court in *UKEF* , at [40(iii)] and [50(ii)]).

193. As is clear from the opening sentence of ¶147 above, the Court of Appeal was not laying down an "*exhaustive or definitive*" list of relevant factors. However, the factors identified by the Court militate against the application of a tenability standard in this case in significant respects:

193.1. The sixth and seventh factors apply generally across Ground 8 and support the application of a correctness standard. For the reasons set out above, it is necessary to determine the obligations under 8A-D in order to decide a justiciable issue, and the SSBT is compelled by domestic law to consider the extent to which the F-35 Carve Out is consistent with international law.

193.2. The first to fifth factors fall to be applied in relation to the different obligations addressed in each of Ground 8A-D:

193.2.1. **First**, there is a significant body of judicial and academic material in relation to each of the obligations relied upon. The Court is not "*undertak[ing] the task of interpretation from scratch*" (per Lord Bingham in *Corner House* at ¶44). Thus:

193.2.1.1. In relation to CA1 the ICJ has confirmed the meaning of the relevant obligation on four occasions: see ¶¶207.2 below.

193.2.1.2. There is significant commentary and subsequent practice by state parties in relation to the ATT. It is also relevant that the UK implements its obligations under Articles 6 and 7 of the ATT via the SELC: see the UK's Initial Report;[243]

193.2.1.3. The meaning of the Genocide Convention obligation has been adjudicated upon by the ICJ;

193.2.1.4. The relevant obligations under the ASR have been recognised by the domestic courts.[244]

193.2.2. **Secondly**, the obligations relied upon by the Claimant are not subject to "*deep and difficult question[s] of profound importance to the whole working*" of the relevant treaties (*cf* *Corner House* at ¶66, per Lord Brown), and the Court's interpretation of them will not disincentivise the SSBT from having regard to the UK's relevant legal obligations in future decisions made under the SELC (*cf* *Corner House* at ¶44, per Lord Bingham). Nor should it impede executive conduct of foreign relations (Lord Bingham in *Benkharbouche* at ¶35). The SSBT is required to consider and to act compatibly with the relevant obligations: this is a consequence of the statutory scheme taken together with the SELC. In particular, Criterion 1 requires the SSBT to interpret and apply the international law obligations at issue under Ground 8.

193.2.3. **Thirdly**, the UK has agreed to the compulsory jurisdiction of the ICJ in relation to disputes under each relevant convention, such that it has accepted the judicial determination of its compliance with the obligations therein. Indeed, judicial determination is the method by which such disputes fall to be resolved. The ATT and Genocide Convention both envisage judicial settlement of disputes: see Article 19 of the ATT; Article 9 of the Genocide Convention. The Geneva Conventions provide for a

[243] Available at https://thearmstradetreaty.org/download/8b6fb808-d6ba-324f-b3e1-d7e9d14b1c5a.
[244] See e.g., *R (Al-Saadoon) v Secretary of State for Defence* [2015] EWHC 715 (Admin); *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221.

discretionary Conciliation Procedure (common Article 11, Article 12 of the Fourth Convention) and an Enquiry Procedure (common Article 52), but the discretionary nature of these mechanisms and their scope and focus contrasts, for example, with the compulsory monitoring and implementation procedure under Article 12 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) considered in *Corner House* at ¶45.[245]

193.2.4. **Fourthly**, whilst the treaty obligations relied upon by the Claimant are significant, this is a factor which supports the application of a correctness standard in the context of this case. If the SSBT adopts a tenable but incorrect interpretation of the international obligations relied upon at 8A-D, then the UK will be in breach of some of the most significant and fundamental obligations in the international legal order. Guidance from this Court, itself an organ of the state, as to the correct interpretation of those obligations is therefore central to the UK's compliance with basic principles of international law.

193.2.5. **Fifthly**, the treaty obligations relied upon are not especially complicated or ambiguous. The Court is well placed to interpret them, particularly in light of the material supplied by the parties as to their proper interpretation.

194. Further, a number of the norms relied upon by the Claimant are binding as a matter of customary international law, as well as treaty (see Ground 9 below). This has a necessary bearing on the appropriate standard of review. By its nature, a norm of customary international law must be clear: a norm of customary international law is established by widespread, representative and consistent practice of states, which is accepted by states on the basis that it is a legal obligation: see *Benkharbouche* at ¶31, per Lord Sumption. Such a norm will, by its nature, be generally clear as to its scope and meaning, and its interpretation is unlikely to impact materially on international relations. The interpretation would simply reflect the way in which states conduct themselves. The case for applying tenability is therefore weaker in respect to customary norms than it is to unincorporated treaty obligations. (The issue does not arise at all, of course, if the

[245] The mechanism under Article 52 has never been used: see ICRC Commentary of 2016, ¶3059, available at https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-52/commentary/2016?activeTab=.

customary rules are received into common law, as the Claimant contends is the case here: see Ground 9 below).

C. INTRODUCTION TO GROUNDS 8(A)-(D)

195. The Defendant misdirected himself or otherwise erred in law in concluding that the continued supply of F-35 parts to Israel complies with his obligations and commitments pursuant to:

195.1. Common Article 1 to the Four Geneva Conventions (Ground 8(A));

195.2. the Arms Trade Treaty (Ground 8(B));

195.3. the Genocide Convention (Ground 8(C)); and

195.4. customary international law obligations, as reflected in the Articles on State Responsibility (Ground 8(D)).

196. The Defendant does not dispute that international law compliance of the transfers fell to be assessed against each of the above obligations and commitments. Notably, SELC 1 stipulates in terms that "*[t]he Government will not grant a licence if to do so would be inconsistent with, inter alia:* […] *b) the UK's obligations under the United Nations Arms Trade Treaty*". The Government's decision-making proceeded (correctly) on the basis that transfers of licenced weapons also had to comply *inter alia* with Common Article 1 of the Geneva Conventions (**"CA1"**) and the Genocide Convention.[246] It also recognised the need to ensure that any support provided to Israel did not aid or assist in the commission of an internationally wrongful act.[247]

197. As explained in Section III.D above, the Defendant's decision-making was based on the ECJU's assessment of compliance with SELC 1 dated 11 June 2024 (Exhibit CH2-49) ("**the June 2024 SELC 1 Assessment**") [SB/E/102/1422-1430], undertaken at a time when the government considered that Israel was committed to complying with international humanitarian law and that there was no clear risk of serious F-35 parts

[246] The June 2024 SELC1 Assessment at ¶3 (Exhibit CH2-49) [SB/E/102/1422]; Annex E to ECJU Submission to SSFCDA dated 24 July 2024 at (Exhibit RP2-1c) [CB/E/35/609-610], largely adopting the analysis in the June 2024 C1 Assessment. For earlier decisions, see, for example, Annex B to the 28 March 2024 briefing to the SSFCA leading up to the April Decision (Exhibit CH2-35) [SB/E/78/975]; and Annex B to the 23 May 2024 briefing to the SSFCA leading up to the May Decision (Exhibit CH2-42) [SB/E/93/1153-1154].

[247] See e.g. Second IHLCAP Assessment (Exhibit CH2-17) [SB/E/46/635] (¶2 "*The IHL assessment process was set up to service three key requirements:* […] *3) ensuring HMG's overarching support to Israel does not aid or assist the commission of an internationally wrongful act*").

exported to Israel being used to commit or facilitate a violation of IHL. That assessment was then relied on in the ECJU Submission to the SSFCA of 24 July 2024 ("**Annex E**") (Exhibit RP2-1c) [CB/E/35/609-610]. Some, but not all, obligations relevant to SELC 1 received limited additional comment in Annex E.

D. GROUND 8A: INCOMPATIBILITY WITH THE UK'S INTERNATIONAL LEGAL OBLIGATIONS TO RESPECT AND ENSURE RESPECT FOR IHL UNDER COMMON ARTICLE 1 OF THE GENEVA CONVENTIONS ("CA1") AND CUSTOMARY INTERNATIONAL LAW

(i) The Defendant's misdirections / errors of law in relation to CA1

198. The Defendant erred in law in two respects, as explained below.

199. A preliminary point concerns the correct interpretation of CA1. CA1 provides that "*[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances*". The orthodox interpretation of CA1 requires a state not only (i) to itself "*respect*" IHL and "*ensure respect*" by all persons subject to its jurisdiction (which the Defendant accepts[248]), but *also* (ii) to "*ensure respect*" by others outside the state's jurisdiction, such as parties to a conflict. In the context of arms exports, it means that where states are "*aware of, at the least, allegations that the behaviour of* [the recipient] *in the field was not consistent with international humanitarian law*",[249] they "*must do everything reasonably in their power to ensure respect for the Conventions by others that are Party to a conflict*" including "*to refrain from transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions*".[250] The Defendant's restrictive interpretation, by contrast, considers the content of CA1 only to apply to (i) above.[251] With that point in mind, the Defendant's errors are as follows.

[248] ADGR ¶24 [CB/A/3/143-144]. This is sometimes called the internal dimension of CA1.
[249] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits Judgment, ICJ Reports 1986, ¶116 and see also ¶256 ("*where the commission of such acts was likely or foreseeable*"; "*were aware of, at the least, allegations that the behaviour of the contrast in the field was not consistent with humanitarian law*").
[250] ICRC Commentary to GC I (2016), ¶¶153, 158, 162; ICRC Commentary to GC III (2021), ¶¶186, 191, 195.
[251] See ¶¶207-208 below where this is addressed in detail. This is sometimes called the external dimension of CA1.

(1) The Defendant failed properly to assess the F-35 Carve Out's compliance with CA1

200. First, the Defendant failed properly to assess whether the continued export of F-35 components was compliant with CA1 following his conclusion that Israel was not committed to complying with IHL and that there was a clear risk that F-35 parts might be used to commit or facilitate serious violations of IHL.

201. Although the June 2024 SELC 1 assessment had queried — for the first time[252] — whether CA1 did impose an obligation on the UK to ensure that other states complied with IHL (as is the widely accepted position), it nevertheless went on to consider the compliance of arms transfers to Israel with CA1 on the basis of that broader interpretation.[253] It concluded that they "*could be argued*" to comply with that broad interpretation of CA1, given that the Defendant had "*satisf*[ied] *himself that Israel has the* […] *commitment to comply with IHL and will use UK exports accordingly*".[254] That was no longer the Defendant's position when considering the Carve-Out: he had concluded as of 24 July 2024 that Israel was *not* committed to complying with IHL overall and that there *was* a clear risk of serious IHL violations.[255] That was a material change in position.

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[252] Cf. Annex B to the 28 March 2024 briefing to the SSFCA leading up to the April Decision (Exhibit CH2-35) [SB/E/78/975] and Annex B to the 23 May 2024 briefing to the SSFCA leading up to the May Decision (Exhibit CH2-42) [SB/E/93/1153-1154], both of which record that CA1 has been considered without raising any suggestion that CA1 does not apply externally.

[253] The June 2024 SELC 1 Assessment ¶¶ 27-28 (Exhibit CH2-49) [SB/E/102/1428-1429].

[254] Ibid, ¶28 [SB/E/102/1428-1429].

[255] Ministerial Submission to the Defendant dated 30 August 2024 (Exhibit RP2-4 and KB1), ¶8 [CB/E/56/898]. See IHL Seventh Assessment, 24 July 2024, ¶108 [CB/E/41/720], ¶131 [CB/E/41/726], ¶137 [CB/E/41/726], referring (at ¶¶22-23 [CB/E/41/696] and ¶92 [CB/E/41/716]]) to the last two IHL Assessments: Fifth IHL Assessment CH2-34, ¶26(i) [SB/E/74/931], ¶56 (unredacted) [SB/E/74/941], ¶77 [SB/E/74/947]; Sixth IHL Assessment, CH2-39 [SB/E/83/991-1018]. See further earlier findings of possible breaches in Third IHL Assessment ('Out of Cycle Assessment'), ¶31 CH2-8 [SB/E/49/671-672]; Fourth IHL Assessment CH2-25, ¶24 [SB/E/61/816]. Articles 23 and 55 are reflective of custom: ICRC, CIHL Rule 55. Other possible violations included violation of the treatment of Palestinian detainees, including the denial of access by the ICRC (IHL Seventh Assessment, 24 July 2024, ¶156 [CB/E/41/732], ¶157 [CB/E/41/733], ¶170 [CB/E/41/735], confirming ¶139 [CB/E/41/729] the previous IHL Assessments on in these three areas: Sixth IHL Assessment CH2-39 ¶72 (unredacted gist) [SB/E/83/1009] and ¶75 (unredacted) [SB/E/83/1009]), ¶¶87-88 (unredacted) [SB/E/83/1011]), ¶101 (unredacted) [SB/E/83/1013]), ¶113 (unredacted) [SB/E/83/1015]), ¶115 (unredacted) [SB/E/83/1015-1016]), ¶125 (unredacted) [SB/E/83/1017]). See further earlier finding of possible breaches in connection with the treatment of detainees: Fifth IHL Assessment (Exhibit CH2-34) [SB/E/74/925, 931]. The open IHL Assessments do not disclose whether the Defendant identified the specific violations of IHL of which he considered there were possible breaches in respect of treatment at the point of capture or during detention, but they must have included, at a minimum, (a) the obligation to treat detained *hors de combat* humanely including through the specific prohibitions on violence to life, health, or physical or mental well-being, including torture, outrages on personal dignity, in particular humiliating and degrading treatment, rape and any form of indecent assault (GC IV, Articles 27, 32 and 147; customary rules codified in AP I, Articles 75(2), 76(1) and 77(1); CIHL Rules 87, 89-90 and 93); (b) the prohibition on killing or wounding persons *hors de combat* (customary rule codified in the Hague Regulations, Article 23(c) and AP I, Article 41; CIHL Rule 47); (c) the prohibition on reprisals against captured persons *hors de combat* (GC IV, Article 33; CIHL Rule 146); and (d) the obligation to detain

202. The June 2024 SELC 1 assessment of compliance with CA1 relied on the UK's stated adherence to a "*rigorous and transparent licensing regime that carefully considers whether any individual items might be used to commit or facilitate serious violations of IHL (Criterion 2c of the SELC)*", notably its "*anxious steps, as part of the assessments conducted in relation to Criterion 2c*".[256] The Government's decision to depart from this claimed "*rigorous and transparent licensing regime*" in the September Decision constituted a further material change.[257]

203. However, the Defendant did not reassess compliance with CA1 accordingly. The assertion in Annex E that the June 2024 SELC 1 Assessment (which predated the above material changes in position) "*considered all the relevant information and assessed the impact of key recent developments*" therefore constituted a material misdirection. In proceeding on the basis of an out-of-date assessment on the erroneous basis that "*there have been no changes or developments that alter ECJU-FCDO's overall conclusions*",[258] the Defendant failed to have regard to an obviously material consideration.[259]

204. To the extent that the September Decision is materially based on the Defendant's view that CA1 does *not* require the UK to ensure respect by others for CA1 pursuant to its restrictive interpretation of the obligation, it is further erroneous on that basis also (see further ¶¶207-208 below).

(2) The Defendant failed to assess the F-35 Carve Out's consistency with its own restrictive interpretation of CA1

205. The Defendant failed to carry out any assessment of whether the F-35 Carve Out complied with his own restrictive interpretation of the UK's obligations under CA1 after July 2024.[260] That failure was material: transfers of F-35 parts to a state that the UK determined has (at least possibly) violated IHL and is not committed to complying with

persons accused of offences in the occupied territory, and, if convicted, to serve their sentences therein, to which no exceptions apply (GC IV, Article 76(1)). The relevant obligations in respect of ICRC access are Articles 76 and 143 of GC IV and ICRC, CIHL Rule 124.

[256] June 2024 SELC 1 Assessment (Exhibit CH2-49), ¶28 [SB/E/102/1428-1429].

[257] See *Nicaragua v. Germany*, Order, ¶17-18, in which the ICJ takes note of Germany's licensing regime.

[258] Annex E to ECJU Submission to SSFCDA 24 July 2024 (Exhibit RP2-1c) [CB/E/35/609-610].

[259] See ¶212.1 below on the point that a finding of a clear risk of serious violations of IHL would automatically engage CA1 and prohibit continued arms exports.

[260] ADGR ¶24 [CB/3/143-144]: "*The obligation "to respect and ensure respect" under CA1 refers to a State's obligation to respect the provisions of the Geneva Conventions and to ensure that all persons within the jurisdiction of that State comply with the Convention.*"

IHL, and where the UK has found a clear risk that the exported parts might be used to commit or facilitate a further serious violation of IHL, are necessarily capable of breaching the UK's the obligations "*to respect and ensure respect*" for the Geneva Conventions under CA1. That is because licencing decisions are taken by UK officials in the UK, and are carried out by arms exporters that are located within the UK and therefore subject to the UK's jurisdiction and/or control: see Section V.A. The Defendant erred in failing to assess whether the transfer of the F-35 components complied with the UK's obligations under CA1 on that basis, even as regards his own restrictive interpretation of the provision.

(ii) The Defendant cannot succeed on a 'makes no difference' basis

206. For completeness, the Defendant has failed to establish that, had he not misdirected himself in the two ways set out above, it would have made no difference for the purposes of ss.31(2A) and (3C) of the Senior Courts Act 1981. He is unable to do so because his three *ex post facto* justifications for his decision-making have no merit, as addressed below.

(1) The Defendant misdirected himself as to the interpretation of CA1

207. The Defendant claims that the obligation in CA1 relates only to persons within a state's jurisdiction and control.[261] That is wrong as a matter of treaty interpretation and custom,[262] as is clear from: (i) the application of the rules of treaty interpretation, (ii) the consistent position of the International Court of Justice, (iii) long-standing and overwhelming majority of state practice, (iv) the authoritative view of the ICRC, and (v) the overwhelming majority of academic commentary. These are dealt with in turn below.

207.1. **The ordinary meaning to be given to the terms of CA1 in their context and in light of the object and purpose of the Four Geneva Conventions (Article 31(1) VCLT)**: Pursuant to CA1 states "*undertake to respect and to ensure respect*" for the conventions "*in all circumstances*".[263] The terms of CA1 are broad, directed at

[261] ADGR ¶24 [CB/3/143-144].
[262] The rule in CA1 (on its orthodox interpretation) is also reflective of a rule of customary international law, the content of which is identical save that it applies to respecting and ensuring respect for all customary IHL, not just the Geneva Conventions. See in particular *Nicaragua v. USA*, ¶220 (which concerned the rule in CA1 as a matter of custom); ICRC, Updated Commentary to Geneva Convention I, 2016, https://ihl-databases.icrc.org/en/ihl-treaties/gci1949/article-1/commentary/2016?activeTab=, ¶¶120, 126, 173.
[263] Emphasis added.

ensuring compliance as comprehensively as possible and contain no limiting qualifiers that would restrict its application in the manner contended for by the Defendant. They are consistent with the object and purpose of the Geneva Conventions, which is to mitigate as far as possible the impact of armed conflict on, and to protect, certain categories of people (particularly civilians and persons rendered *hors de combat*).[264] CA1 serves that object and purpose by requiring states to do all that they reasonably can to prevent violations of the Geneva Conventions, and end continuing violations, where possible.[265] It would plainly be inconsistent with that object and purpose for a state to be at liberty to transfer arms to a state (i) which is not committed to complying with IHL and (ii) has (at least possibly) breached provisions of the Fourth Geneva Convention; and (iii) where there is a clear risk that the items transferred might be used to commit or facilitate a further violation of IHL. It is of particular note that the Defendant does not justify his restrictive interpretation of CA1 by reference to the language of CA1 or the object and purpose of the Geneva Conventions.[266]

207.2. **Repeated judicial authority**: The ICJ has consistently confirmed on no fewer than <u>four</u> occasions that CA1 requires states to ensure compliance by others outside their jurisdiction: Section V.A. It has stated that "*every State party to [the Fourth Geneva] Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with*".[267] It has declared, in relation to Israel's conduct in Palestine specifically, that "*all the States parties to the Fourth Geneva Convention have the obligation* […] *to ensure compliance <u>by Israel</u> with international humanitarian law as embodied in that Convention*",[268] and has separately noted that this obligation applies in respect of the

[264] VCLT, Article 31(1). ICRC Commentary to GC I (2016), ¶¶30-32; ICRC Commentary to GC III (2021), ¶¶89-91. This is also evident from the titles of the four Geneva Conventions.
[265] ICRC Commentary to GC I (2016), ¶154; ICRC Commentary to GC III (2021), ¶187, dealing with the prevention and cessation of violations; see also Dörmann and Serralvo, "Common Article 1 to the Geneva Conventions and the obligation to prevent IHL violations" (2015) 95 *IRRC* 707, p. 715 (quoting the 1950 ICRC Commentary) and p. 731 (on prevention and cessation).
[266] At ADGR ¶25 [CB/A/3/144], the Defendant says its interpretation is based on "*the ordinary meaning of the words used in their context*" but then provides no supporting analysis and no reference to such language or context.
[267] <u>*oPT First Advisory Opinion*</u>, ¶158 (emphasis added). See also ¶159.
[268] <u>*oPT Second Advisory Opinion*</u>, ¶279. See also UNGA Res on the *oPT Second Advisory Opinion*: UN Doc. A/ES-10/L.31/Rev.1, 18 September 2024, at ¶12, calling on states parties to the Fourth Geneva Convention "*to enforce the Convention*" in the oPT "*and to ensure respect thereto in accordance with common article 1 of the four Geneva Conventions*".

"*supply of arms to Israel*".[269] It has further held that there is a customary obligation "*in the terms of Article 1 of the Genva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in all circumstances'*" which applies in respect of "*persons or groups engaged in the conflict*".[270] The Defendant has cited no international judicial ruling in support of his proposed interpretation; he cannot. The Defendant's response to this authoritative recognition of the external dimension of CA1 by the ICJ, both as a matter of custom and treaty, is to seek to distinguish the cases factually or contend that the rulings are not binding individually on the UK.[271] This is unpersuasive for at least three reasons. **First**, ICJ rulings are statements of the law of general application by the highest court in the international legal order. **Second**, pronouncements of the ICJ are a subsidiary means for the determination of rules of law, and are treated as such by UK courts, at the very highest level.[272] **Third**, as the UK has accepted the compulsory jurisdiction of the ICJ pursuant to Article 36(2) of the ICJ Statute,[273] including in relation to disputes pursuant to the Geneva Conventions and customary international law, the interpretation given by the ICJ would be binding on the UK in any proceedings brought against it.

207.3. **Overwhelming state practice**: There is "*overwhelming support in State practice*" for the non-restrictive interpretation of CA1.[274] As summarised by the ICRC: "*Subsequent practice has confirmed the existence of an obligation to ensure respect by others under common Article 1*".[275] This is recognised specifically in the context of Israel / Palestine by Professor Sassóli (on whose selective citation the Defendant purports to rely at ADGR ¶25(c)): *"in practice, subsequent to the 1949 Conventions, the UN Security Council, the ICJ, the UN General Assembly and an overwhelming majority of the States parties to Convention IV have relied on this obligation to call on third States to react to Israeli violations of Convention IV in the Occupied*

[269] *Nicaragua v. Germany Order*, ¶¶23-24 (emphasis added). The Claimant does not understand the Defendant's statement at ADGR ¶26(c)(iii) [CB/A/3/146-147] that ¶24 "*did not refer to CA1*" in circumstances where it referred to "*the above-mentioned Conventions*", which is a direct reference to the preceding ¶23 in which "*common Article 1 of the Geneva Conventions*" — in addition to the Genocide Convention — is mentioned in terms. See also Separate Opinion of Judge Tladi, ¶4 and Separate Opinion of Judge Cleveland, ¶¶8 and 13.
[270] *Nicaragua v. USA*, ¶220.
[271] ICJ Statute, Article 59 provides that ICJ judgments are only binding on parties to the case. Advisory Opinions by definition are not binding.
[272] ICJ Statute, Article 38(1)(d); *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270 at ¶48.
[273] https://www.icj-cij.org/declarations.
[274] Hill-Cawthorne, Common Article 1 of the Geneva Conventions and the Method of Treaty Interpretation (2023) 72 *ICLQ* 869, p. 881 (and detailing of such practice). See also Dörmann and Serralvo, "Common Article 1 to the Geneva Conventions and the obligation to prevent IHL violations"(2015) 95 *IRRC* 707, pp. 716-722.
[275] ICRC Commentary to GC I (2016), ¶156; ICRC Commentary to GC III (2020), ¶189.

Palestinian Territory".[276] This extensive state practice includes practice of the UK, as set out in detail in the Amended Reply.[277] The statement of a US representative relied on by the Defendant in support of his restrictive interpretation[278] does not and cannot detract from the overwhelming state practice in support of the non-restrictive interpretation.

207.4. **The ICRC Commentaries**: The ICRC Commentaries to the four Geneva Conventions are an authoritative statement of the meaning and scope of the Conventions and have been referred to as an "*elaboration of the official travaux*".[279] The ICRC Commentaries reject a restrictive interpretation of CA1.[280] The most recent updates confirm that states "*must do everything reasonably in their power to ensure respect for the Conventions by others that are Party to a conflict*" including "*to refrain from transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions*".[281] The Defendant's attempts to downplay the significance of the ICRC Commentaries are entirely unpersuasive given their authoritative status and the special role of the ICRC in connection with the Geneva Conventions.[282] As with his position regarding ICJ authority, the Defendant's argument that the ICRC Commentaries are not binding[283] is no answer.

207.5. **Overwhelming majority of academic commentary**: The overwhelming majority of academic commentators also support the non-restrictive interpretation of CA1.[284]

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[276] Sassóli, *International Humanitarian Law* (2nd ed., 2024), ¶5.156.
[277] Amended Reply ¶24 [CB/A/4/191-194].
[278] ADGR ¶25(b) [CB/A/3/144-145].
[279] Hill-Cawthorne, Common Article 1 of the Geneva Conventions and the Method of Treaty Interpretation (2023) 72 *ICLQ* 869, p. 899.
[280] Pictet (ed.), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, 1958), p. 16.
[281] ICRC Commentary to GC I (2016), ¶¶153, 158, 162; ICRC Commentary to GC III (2021), ¶¶186, 191, 195.
[282] ADGR ¶26(b) [CB/A/3/145-146]. The ICRC Commentaries are the product of extensive collaboration by renowned scholars of international law, which have taken place over many years. They are regularly cited in international courts and tribunals and domestic courts as an authoritative aid to the interpretation of the Geneva Conventions. The ICJ has recognised the ICRC's "*special position*" with respect to the Fourth Geneva Convention and taken into account its opinion on the interpretation of that Convention: *2004 oPT Advisory Opinion,* ¶97; see also *Korbely v Hungary* (2010) 50 EHRR 48 at ¶¶51 and 90 (fn 28). In the domestic courts, see e.g. *Mohammed v Ministry of Defence* [2017] UKSC 2 at ¶264; *Al Seran* [2019] QB 1251 at ¶240 *per* Leggatt J (as he then was). The ILC has also recognised "*the significance of the acts of the ICRC in exercise of the special functions conferred upon it, in particular by the Geneva Conventions*" (ILC, conclusions on the identification of customary international law, with commentaries (2018), UN Doc. A/73/10, commentary ¶9 to conclusion 4, and footnote 698).
[283] ADGR ¶26(b)(i) [CB/A/3/146].
[284] See, eg, Hill-Cawthorne, Common Article 1 of the Geneva Conventions and the Method of Treaty Interpretation (2023) 72 *ICLQ* 869; Wiesener and Kjeldgaard-Pederson, 'Ensuring Respect by Partners: Revisiting the Debate on Common Article 1' (2022) 27 *JC&SL* 135; Zwanenburg, 'The "External Element" of the Obligation to Ensure Respect

This is material, given that the writings of highly qualified publicists are a subsidiary means for the determination of rules of international law.[285] The Defendant points to three authors who adopt the restrictive view[286] but that again is not an answer. The Claimant does not need to establish unanimity among commentators; minority support for the Defendant's interpretation cannot and does not overcome the extensive support in favour of the broader interpretation

208. The Defendant's other arguments regarding CA1 are similarly without merit:

208.1. The Defendant's assertion at ADGR ¶27 (and fn 17) [CB/A/3/147-148] that it is the UK's "*long-standing and consistent position*"[287] that CA1 does not require state parties to ensure respect for the Geneva Conventions by others outside its jurisdiction is incorrect and plainly so. The examples set out at paragraph 24 of the Amended Reply illustrate that the UK has repeatedly accepted the broad application of CA1, including: (i) in the specific context of arms transfers;[288] and (ii) in the context of Israel / Palestine.[289] The Defendant's failure to identify these examples is regrettable, and incompatible with his duty of candour in these proceedings.

208.2. The Defendant purports to rely on the *travaux préparatoires* to the four Geneva Conventions to suggest that "*negotiating States did not intend CA1 to have an external aspect*" (ADGR ¶25(a) [CB/A/3/144]). However, the Defendant is wrong to suggest that any conclusive position can be drawn from *travaux*. As other detailed analyses of the *travaux* make clear, "*contrary to the claims of some,* […] *there was*

for the Geneva Conventions: A Matter of Treaty Interpretation' (2021) 97 *IntlLStud* 621; Massingham and McConnachie (eds), *Ensuring Respect for International Humanitarian Law* (Routledge, 2020); Boisson de Chazournes and Condorelli (n 15); Demeyere and Meron, 'How International Humanitarian Law Develops: Towards an Ever-Greater Humanization? An Interview with Theodor Meron' (2022) 104(920-921) *IRRC* 1523, 1547-9; Geiss, 'The Obligation to Respect and to Ensure Respect for the Conventions' in Clapham et al (eds), *The 1949 Geneva Conventions: A Commentary* (OUP, 2015); Dörmann and Serralvo, 'Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations' (2014) 95 *IRRC* 707; Kessler, 'The Duty to "Ensure Respect" under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts' (2001) 44 *GYIL* 491; Azzam, 'The Duty of Third States to Implement and Enforce International Humanitarian Law' (1997) 66(1) *ActScandJurisGent* 55.

[285] Article 38(1)(d), ICJ Statute.

[286] ADGR ¶26(a) [CB/A/3/145].

[287] Emphasis added.

[288] Amended Reply ¶24(d) [CB/A/4/193-194] as regards the ATT and the EU User's Guide to the EU Common Position.

[289] Amended Reply ¶24(c) [CB/A/4/192-193] as regards UK voting in favour of relevant UNGA and UNSC resolutions between 1981-2018 and supporting a declaration adopted by the High Contracting Parties to the Fourth Geneva Convention in 2001.

no 'original [restrictive] meaning' of common Article 1 agreed by the parties".[290] Further, *travaux* are in any event merely a "*supplementary means of interpretation*" and may only be relied upon to determine the meaning of a treaty where its meaning is otherwise "*ambiguous or obscure*", or "*leads to a result that is manifestly absurd or unreasonable*": Article 32 VCLT. That is not the position here.

208.3. The Defendant argues against the orthodox interpretation of CA1 on the asserted basis that it would render the obligation "*more extensive*" than the customary international law obligation not to aid or assist another state in the commission of an internationally wrongful act.[291] This argument appears to confuse two distinct rules: (1) a state's *own primary obligation* under CA1 to respect and ensure respect for the Geneva Conventions; and (2) the secondary rule contained in Article 16 of the ASR that describes when responsibility will arise consequential upon having assisted *another* state's breach of *their obligation*. As the ICRC explains: "*Common Article 1 and the rules on State responsibility thus operate at different levels. The obligation to ensure respect for the Conventions is an autonomous primary obligation that imposes more stringent conditions than those required for the secondary rules on State responsibility for aiding or assisting*". The ICRC then explicitly confirms that

[290] Hill-Cawthorne, Common Article 1 of the Geneva Conventions and the Method of Treaty Interpretation (2023) 72 *ICLQ* 869, pp. 898-899: *"Previous analyses of common Article 1 tend to conclude that the travaux either do not reveal any intention either way regarding an external element to that provision, or that they demonstrate that such an obligation was explicitly rejected by the negotiating States (with the words 'ensure respect' referring to obligations vis-à-vis a State's own population). As regards the travaux of Article 1(1) of AP I, this question is often ignored altogether. The draft of common Article 1 received very little attention at the 1949 diplomatic conference, and the few interventions that were made do not establish a clear consensus for or against an external obligation. Italy's delegate to the conference argued that 'the terms "undertake to ensure respect" should be more clearly defined. According to the manner in which they were construed, they were either redundant, or introduced a new concept into international law.' Moreover, whereas the delegates for Norway, the US, France and Monaco (the only other States to comment) said that they 'considered that the object of this Article was to ensure respect of the Conventions by the population as a whole', the ICRC delegate noted in reply that 'the Contracting Parties should not confine themselves to applying the Conventions themselves, but should do all in their power to see that the basic humanitarian principles of the Conventions were universally applied'. Though there is some disagreement as to what was meant here by 'universal application', it seems that it was used in contradistinction (and in addition) to application within a specific State and thus referred to promoting compliance by others. As is often the case, the travaux do not resolve the conundrum of how to interpret common Article 1. There is value, nonetheless, in noting this, as it demonstrates, contrary to the claims of some, that there was no 'original [restrictive] meaning' of common Article 1 agreed by the parties.*" The fuller remarks of the ICRC during the negotiations of the four Geneva Conventions are set out in Dörmann and Serralvo, "Common Article 1 to the Geneva Conventions and the obligation to prevent IHL violations"(2015) 95 *IRRC* 707, pp. 712-713.

[291] ADGR ¶23-24 [CB/A/3/143-144].

providing support may breach CA1 *even where it does not amount to aiding or assisting* under Article 16 of the ASR. [292]

209. The continued supply of F-35 parts to Israel is incompatible with CA1 on this basis.

(2) CA1 cannot be 'read down' by reference to Articles 6(3) and 7 ATT

210. The Defendant introduced a new argument in his amended ADGR that "*to the extent that CA1 might be argued to extend an obligation in respect to the behaviour of other States, the scope of any such obligation in relation to arms exports must be interpreted in light of the obligations arising under Articles 6 and 7 of the ATT*"[293] and as such must be 'read down'. The argument is not clear. It appears to suggest, however, that insofar as CA1 is said to require the UK to ensure respect for IHL by states to which it is transferring licenced items, it should *only* be read as so applying where a relevant transfer would contravene the Defendant's interpretation of Article 6(3) or Article 7 of the ATT.

211. This argument is unmeritorious for the following five reasons:[294]

211.1. **It is contrary to established principles of treaty interpretation**: While the Defendant cites Article 31(3)(c) of the VCLT in support of his argument,[295] Article 31(3)(c) is limited to where the other rules of international law are "*applicable in the relations between the parties*"; that is, between *all* the parties to the treaty being interpreted[296] (here, all the parties to the Geneva Conventions). This ensures that states' treaty obligations are not interpreted by reference to rules of international law to which they did not consent. The Geneva Conventions have been ratified by 196

[292] ICRC Commentary to GC I, ¶¶159-160; ICRC Commentary to GC III, ¶¶192-193. See also Nicaragua v. USA, ¶255 ("*The question here does not of course relate to the definition of the circumstances in which one State may be regarded as responsible for acts carried out by another State*"). On Article 16 ASR, see Ground 8(D) below.
[293] ADGR ¶27 [CB/A/3/147-148].
[294] See Amended Reply ¶26 [CB/A/4/196-198].
[295] ADGR ¶27, fn 31 [CB/A/3/147].
[296] McLachlan "The Principle of Systemic Integration and Art 31(3)(c) of the Vienna Convention" (2005) 54 *ICLQ* (2005) 279, pp. 313-315; Linderfalk, "Who are 'the Parties'? Article 31, paragraph 3(c) of the 1969 Vienna Convention and the 'principle of systemic integration' revisited" (2008) *Netherlands International Law Review* 55, pp. 343-364. See, e.g., judicial application: *EC - Measures Affecting the Approval and Marketing of Biotech Products* (7 February 2006) WT/DS291-293/INTERIM, p. 299, ¶7.68. See also as to "*the parties*" meaning all of the parties in Article 31(3)(a)-(b): ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, UN Doc. A/73/10, conclusion 4, commentary ¶¶4 and 16.

states; the ATT by 116 states. The condition for Article 31(3)(c) to apply is therefore not satisfied.[297] CA1 therefore cannot be 'read down' by reference to the ATT.

211.2. **The Defendant ignores Article 6(2) ATT**: Article 6(2) ATT is self-evidently the most relevant provision in respect of state parties' other treaty commitments. It provides in terms that "[a] *State Party* [to the ATT] *shall not authorize any transfer* […] *if the transfer would violate its relevant international obligations under international agreements to which it is a Party*". Those agreements include the four Geneva Conventions, and thus include CA1. CA1 cannot be 'read down' in circumstances where Article 6(2) gives full effect to it.

211.3. **The Defendant ignores Article 26(1) ATT**: Article 26(1) provides that "*[t]he implementation of this Treaty shall not prejudice obligations undertaken by States Parties with regard to existing or future international agreements, to which they are parties, where those obligations are consistent with this Treaty*".[298] The Defendant cannot and does not suggest that CA1 is inconsistent with the ATT. The ATT cannot 'read down' the UK's obligations under CA1.

211.4. **The Defendant's argument is illogical and leads to perverse consequences**: The Defendant's position would mean that a broad and protective humanitarian obligation, binding on all states as a matter of custom and owed *erga omnes*,[299] could be 'read down' by reason of a small group of states agreeing a narrower obligation in a treaty on a particular topic and in a situation where the treaty does not indicate an intention to depart from an important rule of custom.[300]

211.5. **The Defendant's argument is in any event premised on the Defendant's own interpretation of ATT Articles 6(3) and 7(3)**: That interpretation, which has no

[297] While CA1 therefore cannot be interpreted by reference to the ATT, the ATT can be interpreted by reference to the customary duty to respect and ensure respect for IHL because that *is* a rule that is binding between all the parties to the ATT. On the customary status of the rule in CA1 see ¶¶284-288. As explained at fn 227 above, the way in which CA1 is relevant to the interpretation of the ATT is through Article 6(2).

[298] (emphasis added). See Kobecki and Pittmann, "Article 26" in Da Silva and Wood (eds), *The Arms Trade Treaty: Weapons and International Law* (Intersentia, 2021), 409: "*In essence, Article 26(1) provides that obligations already undertaken by States Parties in other international agreements or created in future agreements are not affected by the existence of the ATT, to the extent that those obligations are 'consistent' with the ATT. Those obligations are subject to 'prejudice' only where they are inconsistent with the ATT*."

[299] ICRC Commentary to GC I (2016), ¶19; ICRC Commentary to GC III (2020), ¶152.

[300] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, I.C.J. Reports 1989, ¶50 ("*the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so*").

support in state practice — including UK state practice — is wrong (see VI.E(iv)-(v) below).

(3) The Defendant's "very small" risk argument

212. The Defendant advances yet a further new argument at ADGR ¶28 [CB/A/3/148] to the effect that the continuing export of F-35 parts to the global F-35 pool neither engages nor breaches the duty under CA1 because the likelihood of the indirect transfers ending up in "*existing*" Israeli F-35s is "*on a broad analysis*" "*very small*", and because Article 7 of the ATT permits international peace and security considerations to be taken into account.[301] This argument again has no merit, for the following reasons:

212.1. **It is based on a flawed legal premise**: The indirect nature of the transfers is immaterial as a matter of law to the UK's obligations under CA1, as is the distinction between "*existing*" F-35 jets already in Israel as of the date of the September Decision and ones yet to be delivered, and the purportedly "*very small*" risk of UK-exported parts ending up in existing Israeli F-35s. All that is required for CA1 to be triggered is that the UK is "*aware of, at the least, allegations that the behaviour of* [the recipient] *in the field was not consistent with international humanitarian law*".[302] As soon as the obligation is triggered, the UK "*may neither encourage, nor aid or assist in violations of the Conventions*" and "*must do everything reasonably in [its] power to prevent and bring such violations to an end*".[303] This includes "*refrain*[ing] *from transferring weapons*".[304] There is no leeway whereby the UK is permitted by CA1 to assist IHL violations to a "*very small*" degree, and/or pursuant to "*a broad analysis*". The position is the same as the automatic prohibition of exports upon the obligation to prevent genocide being triggered: the Defendant appears to recognise that an argument that exports will assist a state in committing genocide to a "*very small*" degree cannot avail it in relation to its obligation under the context of the Genocide Convention, and has not made this new "*small risk*" argument in relation to that obligation. Neither is the point legally relevant to CA1.

[301] ADGR ¶28 [CB/A/3/148].
[302] Nicaragua v. USA, ¶¶116, 256; ICRC Commentary to GC I (2016), ¶162; ICRC Commentary to GC III (2021), ¶195 ("*Common Article 1 requires High Contracting Parties to refrain from transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions*").
[303] ICRC, Commentary to GC I (2016), ¶¶153-154; ICRC Commentary to GC III (2021), ¶¶186-187.
[304] ICRC Commentary to GC I (2016), ¶162; ICRC Commentary to GC III (2021), ¶195.

212.2. **It is at odds with on its face the Defendant's evidence of the UK's role in the F-35 programme**, including the material that was before the Defendant in making the Carve-Out decision. That provides inter alia that:

212.2.1. "[t]*he F-35 Programme is significantly dependent on the UK; we are the largest national provider of component parts outside of the US, most of which are unique to us, critical to the aircraft and amount to 15% of the airframe*";[305] for example, *"all the ejection seats for the F-35 programme are manufactured in the UK*": Letter from Defence Secretary 11 June 2024 (Exhibit RP2-8) [CB/E/29/586].

212.2.2. "*The UK is the sole supplier of certain parts which are critical to the operation of the aircraft, including the Electrical Power Management System, Life Support system, ejector seat, weapons bay door actuators, vertical tail fins and horizontal stabilisers and the aft fuselage*": Bethell 1 ¶22 [CB/D/26/565-566].

212.2.3. *"The UK also produces sub-components that are integrated by other nations into higher assemblies and systems"*; and *"UK suppliers provide their parts and components to the GSS* [support service for all F-35 users, including Israel] *when demanded by the Prime Contractors without knowledge and indication of where the part is destined"*: Letter from Defence Secretary 11 June 2024 (Exhibit RP2-8) [CB/E/29/587-588].

212.3. **It contradicts information in the public domain regarding the UK contribution to the F-35 programme**: As the UK is the sole supplier of critical parts that account for approximately 15% by value of every F-35 jet produced,[306] it follows that every new F-35 jet will, by definition, include UK parts. Israel received three additional new F-35 fighter jets in March 2025, [307] and has ordered 25 new F-35 fighter jets as of June 2024.[308] F-35s used in combat require frequent repair and therefore likely require a constant level of spare parts, including those which the UK supplies to the

[305] See also [CB/E/30/589] "*The UK's contribution to the production accounts for 15% by value of each aircraft produced*".
[306] Detailed advice from Defence Secretary, 18 July 2024 (Exhibit RP2-9) [CB/E/30/589]; Andrews-Briscoe 2 ¶30 [CB/D/27/580].
[307] Andrews Briscoe 2 ¶23 [CB/D/27/577]. See also Detailed advice from Defence Secretary, 18 July 2024 (Exhibit RP2-9) [CB/E/30/589] referring to expected delivery of F-35s to Israel at the end of 2024.
[308] Andrews Briscoe 2 ¶23 [CB/D/27/577].

global pool.[309] UK-exported F-35 parts are therefore being used and will be used in any and all F-35 Israeli fighter jets, including in F-35s requiring repair due their heavy use in bombing missions in Gaza.

212.4. **The Defendant's reliance on Article 7 ATT is not to the point**: The proposed reliance at ADGR ¶28(b) [CB/A/3/148] on his (erroneous) interpretation of Article 7 (but notably not Article 6) is wrong for the same reasons as his argument regarding 'reading down' CA1.[310]

E. GROUND 8B: INCOMPATIBILITY WITH THE UK'S INTERNATIONAL LEGAL OBLIGATIONS UNDER THE ARMS TRADE TREATY

213. The Defendant erred in law in relation to the UK's obligations under the ATT. His errors relate both to his misdirection as to the assessment required by the ATT, and to his compliance with his obligations under each of the relevant ATT articles. These errors are set out below following an overview of Articles 6 and 7.

(i) The ATT's operation

214. Articles 6 and 7 are "*the 'heart' of the ATT* […] *the life of the treaty is dependent on these articles functioning properly*".[311]

215. Article 6, entitled "*Prohibitions*", strictly prohibits an ATT state party from transferring licenced items: (i) where the transfer: "*would violate its obligations under measures adopted by the United Nations Security Council*", such as arms embargoes (Article 6(1)); (ii) where the transfer "*would violate its relevant international obligations under international agreements to which it is a Party*" (Article 6(2)); and (iii) "*if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party*" (Article 6(3)).

216. Insofar as transfers are not strictly prohibited under Article 6, a state party must then "*in an objective and non-discriminatory manner, taking into account relevant factors,*

[309] Andrews Briscoe 2 ¶¶19-21 [CB/D/27/576-577].
[310] See ¶¶210-211.
[311] Clapham et al, *The Arms Trade Treaty: A Commentary* (2016) ("**the ATT Commentary**"), ¶6.02.

including information provided by the importing State in accordance with Article 8(1) [which requires an importing state to take measures to ensure that relevant information is provided to the exporting state, such as information about end use]", assess the "*potential*" that the items: (i) "*would contribute to or undermine peace and security*" (Article 7(1)(a)); "*could be used to commit or facilitate*" (ii) "*a serious violation of* [IHL]" (Article 7(1)(b)(i)); (iii) "*a serious violation of* [IHRL]" (Article 7(1)(b)(ii)); (iv) an act relating to terrorism (Article 7(1)(b)(iii)); or (v) an act relating to international organised crime (Article 7(1)(b)(iv)); taking into account the risk of the items being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children (Article 7(4)).

217. Pursuant to Article 7, an ATT state party is also required to ("*shall*") consider measures that could be undertaken to mitigate risks identified in Article 7(1)(a) or (b) "*such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States*" (Article 7(2)). However, if "*after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences*" in Section 1, they "*shall not authorize the export*".

218. The exercise at the heart of the ATT therefore plainly requires an assessment by the UK of all the evidence to establish the extent, level and nature — including the legal characterisation — of the risk(s) in issue, and whether the export of the item is to be strictly prohibited, or whether mitigating measures (where permitted) would be capable of mitigating those risks, such that the export could be authorised:

218.1. **As regards the risk of terrorism or organised crime offences, atrocity crimes, or other violations of IHL/IHRL**, the ATT requires the UK to assess whether the export (i) would breach the UK's international obligations as set out in international agreements to which it is a party (such as to be strictly prohibited by Article 6(2)); and, if not, whether the evidence establishes a risk of the export (ii) being used in the commission of genocide, crimes against humanity or certain war crimes (such as to be strictly prohibited by Article 6(3)); or (iii) being used to facilitate such crimes, or in the commission or facilitation of, *inter alia*, a serious violation of IHL or IHRL (such that it must not be authorised if, the UK having considered mitigating measures, the risk remains overriding, pursuant to Article 7).

218.2. **As regards questions of peace and security**, the ATT requires the UK to assess whether the export (i) would breach the UK's international obligations under measures adopted by the Security Council regarding "*threats to the peace, breaches of the peace and acts of aggression*",[312] including any arms embargo (such as to be strictly prohibited pursuant to Article 6(1)); and if not, (ii) whether the export would undermine peace and security (such that it must not be authorised if, the UK having considered mitigating measures, the risk remains overriding, pursuant to Article 7(3); and (iii) if the negative risk is not overriding, whether it would contribute to peace and security (such that the UK could nevertheless still refuse the export if there were no clear *positive* benefit).

218.3. The UK is required to take into account risks of gender-based violence or serious acts of violence against women and children in making these assessments (Article 7(4)).

(ii) Failure to conduct the assessment required by the ATT

219. The Defendant's asserted rationale for why an analysis of his methodology was irrelevant to the Claimant's present challenge was as follows (see further Section III):[313]

> The premise for the F-35 Carve Out was thus that there was a clear risk that Israel might commit serious violations of IHL in the conduct of hostilities including through the use of F-35s. The F-35 Carve Out accepts that there is clear risk that F-35 components might be used to commit or facilitate a serious violation of IHL but determines that in the exceptional circumstances outlined by the Defence Secretary, these exports should nonetheless continue. The risk was therefore taken as established, including in relation to the conduct of hostilities. Moreover, there was no need to seek further to finesse or calibrate that clear risk, even leaving aside the difficulties of trying to do so. In those circumstances, the F-35 Carve Out decision making did not turn on any such finessing or calibration of risk.

220. The Defendant similarly explained that his "*good reason*" for departing from the SELC, namely the interests of international peace and security, was "*a matter of such gravity* […] *that it would have overridden any such further evidence of serious breaches of IHL*";[314] and that "*given the forward-looking nature of this assessment, this element of risk would not have weighed more heavily in the balance even if the Defendant had*

[312] UN Charter, Chapter VII.
[313] DGR, 20 December 2024, ¶14(c)-(d) now removed from the ADGR.
[314] DGR, 20 December 2024, ¶19.

adopted a different approach to the analysis of Israel's conduct of hostilities and even if that different approach had led him to reach a different conclusion on Israel's compliance with IHL in that regard".[315]

221. That approach by the Defendant to the assessment of risk, including his determination that it was not necessary further to assess the nature, extent or legal characterisation of the risk to which the continuing export of F-35 parts to Israel gave rise, constituted a fundamental misdirection as to his obligations under the ATT: as above, the ATT *requires* a state to assess *all relevant evidence* to ascertain the nature of the risk to which an export gives rise, including to determine whether the risk requires a strict prohibition of the export (Article 6) or whether the state may engage with the importing state to assess possible mitigating measures capable of addressing and reducing any risk of undermining peace and security and/or of any serious violation of international law identified (Article 7).

222. Therefore, in order to satisfy himself that the continuing transfer of F-35 parts to Israel was consistent with the UK's international obligations and/or with Criterion 1, including with his obligations under the ATT, and the international agreements to which he had to have regard pursuant to Article 6(2), the Defendant was required to do more than consider whether the 'clear risk' threshold had been met for the purposes of SELC 2(c): the Defendant was required to undertake a good faith, objective assessment of the nature, gravity and/or extent of the risk of continuing to transfer of F-35 parts to Israel. He failed to do so. By adopting a position that the asserted interests of international peace and security "*would have overridden any* […] *further evidence of serious breaches of IHL*" the Defendant erred in law in relation to the interpretation: (i) of Article 7 itself (which allows for no such balancing against peace and security (see further ¶¶243-245 below); (ii) of Article 6(2) and 6(3), which strictly prohibit exports where the relevant tests are met; and (iii) of the operation of the ATT as a whole. This amounted to a material misdirection in the context of both the SSBT's assessment of compliance with Criterion 1 and his self-direction as to the compatibility of the F-35 Carve-Out with the UK's international obligations.

[315] DGR, 20 December 2024, ¶140.

(iii) Article 6(2)

223. As set out at Ground 8(A) and Ground 8(C), the position at the time of the decision was (as it still is) that the continued export of F-35 parts "*would violate*" the UK's obligations under CA1 and Article I of the Genocide Convention. The F-35 Carve-Out was therefore inconsistent with the UK's obligation under Article 6(2) of the ATT.

224. The Defendant failed to reach that conclusion, however, because he erred in two key respects as regards his assessment that the continued supply of F-35 parts complied with Article 6(2).

225. **First**, as with CA1 (see ¶¶200-203 above), the Defendant failed to carry out <u>any</u> updated analysis of Article 6(2) following his highly significant conclusions that (i) Israel was not committed to complying with IHL, and (ii) there was a clear risk that items exported might be used to commit or facilitate serious violations of IHL. Indeed, the Defendant's reasoning in the July 2024 SELC 1 Assessment (Annex E) erroneously recorded that "*there have been no changes or developments that alter*" the conclusions in the June 2024 SELC 1 Assessment.[316] But the June 2024 SELC 1 Assessment's reasoning on Article 6(2) had been based on the analysis that "*transfer of the relevant items* […] *to Israel would not violate [the UK's] relevant obligations* [...] *to prevent genocide, [or under] CA1*",[317] a finding which was in turn based on an assessment of compliance with CA1 and the Genocide Convention which predated the change in the Defendant's position on Israel's commitment to comply with IHL and the existence of a clear risk that arms exported to Israel might be used to commit or facilitate serious violations of IHL.

226. As a result, the Defendant's self-direction on Article 6(2) was unlawful, as it was premised on a failure to have regard to an obviously material consideration. Further, to the extent that the September Decision is materially based on the Defendant's errors of law as set out in relation to CA1 and Article I of the Genocide Convention, the Defendant misdirected himself in determining that F-35 exports were consistent with his obligations under Article 6(2), in circumstances where they would (and do) violate

[316] Exhibit RP2-1c [CB/E/35/609]
[317] Exhibit CH2-49 [SB/E/102/1429].

the UK's "*relevant international obligations under international agreements to which it is a Party*" (for the reasons set out in Grounds 8(A) and 8(C)).

227. **Second**, the Defendant erred in construing the words "*would violate*" in Article 6(2) as requiring actual knowledge that a relevant international obligation would, with certainty, be breached.[318] That is wrong:

227.1. There is no reference to knowledge (let alone actual knowledge) anywhere in Article 6(2).

227.2. The words "*would violate*" posit a hypothetical future transfer: if the export were to take place, would it violate a relevant international obligation? That question is answered only by reference to the content of the international obligation in question. This is made clear: (i) when read in conjunction with Article 6(1), which prohibits an export where it "*would violate*" a state's "*obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes*"; and/or (ii) by reference to the French version of the ATT, on which the Defendant elsewhere relies,[319] which uses the conditional tense of the verb to violate ("*violerait*"[320]) in both subclauses. If, therefore, the export *would* violate the obligation in question, authorising the transfer would breach both that international agreement and Article 6(1) or (2). There is no additional knowledge element.

227.3. The Defendant's proposed interpretation would instead *permit* arms transfers that *would* violate a state's relevant international obligations, so long as the exporting state did not have actual knowledge of the breach. That is inconsistent with: (i) the objects of the ATT, which include establishing the "*highest possible common international standards*" for regulating the arms trade; (ii) the purposes of the ATT, which include "[r]*educing human suffering*"; (iii) the guiding 'principles' of the ATT, which include the "*responsibility of all States, in accordance with their respective international obligations, to effectively regulate the international trade in*

[318] ADGR ¶30 [CB/A/3/148]; the June 2024 SELC 1 Assessment (Exhibit CH2-49) [SB/E/102/1429].
[319] ADGR ¶44(h) [CB/A/3/152].
[320] Arms Trade Treaty (French), available at https://thearmstradetreaty.org/hyper-images/file/Traitesurlecommercedesarmes/Traitesurlecommercedesarmes.pdf?templateId=137262. Per Article 33(1) of the VCLT, when a treaty has been authenticated in two or more languages, the text is equally authoritative in each language (and see Article 28 ATT). The ATT is authenticated in: Arabic, Chinese, English, French, Russian and Spanish.

conventional arms";[321] and, importantly, (iv) the purpose behind Article 6(1) and (2), which was not to create any *new* substantive obligations but rather to *prevent* transfers that violate the obligations by which a state is already bound pursuant to international agreements to which it is a party, including the United Nations Charter, and to subject such transfers to the regulatory mechanisms in the ATT. [322]

227.4. Moreover, on the Defendant's approach, an exporting state that was ignorant of its relevant international obligations, including because it had refused to undertake any proper assessment as to breach or had otherwise wilfully closed its eyes, could thereby seek to avoid the strict prohibition of Article 6(2) (or Article 6(1)). That plainly could not have been the intention of the states parties to the ATT, in light of the object and purpose of the treaty and 'principle' set out in the preceding sub-paragraphs

(iv) Article 6(3)

228. The Defendant also misdirected himself in relation to Article 6(3). He did so in two main respects: (i) he erred in interpreting Article 6(3) as requiring actual knowledge, and (ii) he erred in concluding that he did not have the requisite knowledge, whether actual or constructive, that F-35 parts would be used in the commission of the specified wrongs in Article 6(3).

(1) The knowledge threshold

229. The Defendant erroneously interprets Article 6(3) as requiring "*actual knowledge (i) that the relevant atrocity crime is taking place or would take place, and (ii) that the items transferred would be used in its commission*" and considers that this "*is a higher threshold than there being a clear risk that the item might be used to commit of* [sic] *facilitate a serious violation of IHL*".[323] This is an error of law in at least three respects.

230. **First**, Article 6(3) does not require actual knowledge that future events would <u>certainly</u> occur; it requires knowledge of a <u>risk</u> of such events occurring.

[321] ATT, Article 1 and preamble ("*Principles*").
[322] Such as, e.g., reporting requirements in Article 13(1). See da Silva and Neville, "Prohibitions" in Wood and da Silva (eds), *Weapons and International Law: The Arms Trade Treaty* (Intersentia, 2013), p. 113.
[323] The July 2024 SELC 1 Assessment (Annex E) (Exhibit RP2-1c) [CB/E/35/609]. See also the June 2024 SELC 1 Assessment (Exhibit CH2-49) [SB/E/102/1430] .

230.1. Article 6(3) is concerned with preventing the transfer of arms where the sending state has "*knowledge at the time of the authorization that the arms or items would be used in the commission*" of genocide, crimes against humanity and certain war crimes.[324] It is logically impossible to have actual knowledge that a future event will occur with certainty (which is the test implied by the Defendant's position).[325] Accordingly, Article 6(3) must be concerned with knowledge of a risk that the items will be so used, with knowledge reflecting an evidentiary threshold. As the ICRC guide to the ATT explains, the use of "*would*" rather than "*will*" indicates "*a lower burden of evidence to deny the transfer*". [326] Indeed, the French and Spanish texts of the ATT posit the same risk test for both Article 6(3) and Article 7(1)(b), using the same terms to translate "*would*" for the purposes of the former and "*could*" for the latter (respectively: "*pourrai*[en]*t servir à commettre*"; and "*Podrían utilizarse para* […] *cometer*").

230.2. This good faith interpretation[327] is consistent with the context in which the word appears in Article 6(3), with an object and purpose of the ATT being to "[r]*educ*[e] *human suffering*"[328] and with the purpose of Article 6(3) being to prevent the specified wrongs listed therein.[329]

230.3. It is also consistent with state practice (Article 32 VCLT[330]). The ATT states parties have confirmed that under Article 6(3) they "*need to make a prospective assessment of the future behaviour of a recipient, how they are likely to behave and how the arms to be transferred will likely be used*".[331] A number of states parties have further confirmed that the relevant "*knowledge*" threshold will be satisfied for the purposes of Article 6(3) where they have "*clear and reasonable grounds to believe*" or

[324] Given the purpose of Article 6(3) is to *prevent* the occurrence of the specified wrongs, no such wrongful act (i.e. genocide, crimes against humanity or certain war crimes) needs to have been committed in order for Article 6(3) to be breached. See ATT Commentary, ¶¶6.89 and 6.85. See also *CAAT I DC* at ¶¶29 and 201 regarding the predictive and prospective nature of the judgements. This distinguishes Article 6(3) from the rule in Article 16 ASR.
[325] ADGR ¶33, 35 [CB/A/3/149-150].
[326] ICRC, "Understanding the Arms Trade Treaty" (2016), available at: https://icrcndresourcecentre.org/wp-content/uploads/2016/11/4252_002_Understanding-arms-trade_WEB.pdf, p. 29.
[327] VCLT, Article 31(1).
[328] ATT, Article 1.
[329] See ATT Commentary, ¶6.99; da Silva and Neville, "Article 6: Prohibitions" in da Silva and Wood (eds), *The Arms Trade Treaty: Weapons and International Law* (Intersentia, 2021), p. 134.
[330] ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, 2018, UN Doc. A/73/10, Conclusion 2(4) (*"Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32"*).
[331] Working Group on Effective Treaty Implementation, Voluntary Guide to Implementing Articles 6 & 7 of the Arms Trade Treaty, 19 July 2024, ¶54. See the Executive Summary as to this document being "*endorsed by States Parties at the Tenth Conference of States Parties*."

"*reliable information providing substantial grounds to believe*" that the arms would be used to commit the specified wrongs.[332]

230.4. This interpretation is also confirmed by leading commentators,[333] who recognise that a state party "*has an obligation not to transfer where there is a certain risk of a future event and it has to evaluate that risk"*,[334] and that the relevant knowledge threshold is met when there is "*real risk*" of commission of one of the specified wrongs.[335] They consider that arms "*would be used*" for the prohibited activities where "*there is sufficient information, or reasonable grounds, or a reasonable basis for believing the arms would be used for that purpose*".[336] The ICRC considers that Article 6(3) is engaged where the state party "*has substantial grounds to believe, based on information in its possession or that is reasonably available to it, that the weapons would be used to commit genocide, crimes against humanity or war crimes*".[337]

230.5. These knowledge thresholds draw on prospective risk assessments that are well-known in other relevant rules of international law which seek to prevent the occurrence of international crimes and human rights violations, in particular rules relating to torture and prohibition on refoulement (which in their customary form are relevant per Article 31(3)(c) VCLT).[338] Such an analogy is apt given the nature and the seriousness of the specified wrongs Article 6(3) seeks to avoid.

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[332] See Joint Statement of Argentina, Chile, Colombia, Guatemala, Jamaica, Mexico, Peru, Trinidad and Tobago, and Uruguay to the effect Article 6(3) should apply where there were "*clear and reasonable ground*[s] *to believe that the weapons would be used for a prohibited act*"; and the Interpretative Declaration of Switzerland and Lichtenstein on ratification — that the state shall not authorise the transfer "*if it has reliable information providing substantial grounds to believe that the arms or items would be used in the commission of the crimes listed*": see da Silva and Neville, "Article 6: Prohibitions" in da Silva and Wood (eds), *The Arms Trade Treaty: Weapons and International Law* (Intersentia, 2021), pp. 134-135.

[333] Article 38(1)(d), ICJ Statute.

[334] ATT Commentary, ¶6.95. An analogy is drawn with the inquiry made by a state when a refugee claims that expulsion would mean that their life 'would be threatened': ibid.

[335] ATT Commentary at ¶¶6.99 (and footnote 148), 6.104, 6.105, 6.146, 6.149, 6.154, 6.165, 6.183.

[336] Da Silva and Neville, "Article 6: Prohibitions" in da Silva and Wood (eds), *The Arms Trade Treaty: Weapons and International Law* (Intersentia, 2021), p. 134.

[337] ICRC, "Understanding the Arms Trade Treaty" (2016), available at: https://icrcndresourcecentre.org/wp-content/uploads/2016/11/4252_002_Understanding-arms-trade_WEB.pdf, pp. 26 and 29.

[338] See the Convention Against Torture, Article 3(1) (prohibition on expulsion where "*there are substantial grounds for believing that he* [i.e. the expellee] *would be in danger of being subjected to torture"*). Article 3(2) records the requirement for competent authorities to take into account, *inter alia*, "*the existence in the State concerned of a consistent pattern of gross, flagrant or mass violation of human rights*". On the customary status of Article 3 of the Convention Against Torture see: Ammer and Schuechner, "Article 3" in Nowak et al (eds), *The United Nations Convention Against Torture and Its Optional Protocol: A Commentary* (OUP, 2nd ed, 2019), ¶72. See similarly *Soering v United Kingdom* (1989) 11 E.H.R.R. 439 at ¶91 ("*real risk of being subjected to*" treatment contrary to Article 3 of the European Convention on Human Rights). See further ATT Commentary ¶¶6.95-6.99 and footnote 148. See also as regards prospective risk assessments in relation to the prevention of genocide: *Bosnia Genocide*, ¶432 ("*aware, or should normally have been aware, of the serious danger that acts of genocide would be committed*"); *Nicaragua v.*

230.6. If Article 6(3) were instead interpreted to require actual knowledge of the certain occurrence of a future event, the standard would be set so high as to render Article 6(3) meaningless, as it would be impossible to satisfy. That would be inconsistent with the terms of Article 6(3), the context in which the term "*knowledge*" appears, the above-mentioned object and purpose of the ATT, and the purpose of Article 6(3) itself. Such an interpretation would also wrongly read out any element of risk or a risk assessment in Article 6(3) — which, as addressed at 230-234 below, was a material error made by the Defendant: he failed properly to assess risk in relation to Article 6(3).

230.7. Against all of that, the Defendant places reliance *only* on what he says is the "*ordinary meaning*" of Article 6(3),[339] without any reasoned analysis of the terms of Article 6(3), or indeed of any other aspect of the rules of treaty interpretation,[340] without reference to state practice (including the UK's), and while ignoring the obvious consequences of his position, *viz* that it makes Article 6(3) virtually impossible to satisfy and therefore meaningless. The Defendant does point to one contextual factor — the "*significant restrictions*" Article 6 places on states by requiring the prohibition of transfers[341] — but that does not assist him: the very purpose of Article 6(3) is to prevent atrocity crimes and thus the *entire point* of the provision is to impose such significant restrictions where the requisite standard is met.

231. **Second**, "*knowledge*" for the purposes of Article 6(3) can be satisfied by <u>constructive</u> knowledge. [342]

231.1. This follows from the fact that the test is concerned with a process of risk-analysis carried out by a state: see above. Moreover, a requirement of actual knowledge would mean a (deliberately) deficient risk-analysis exercise would comply with Article

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<u>*Germany*</u>, ¶23 ("*aware, or* […] *should normally have been aware, of the serious risk that acts of genocide would have been committed*").

[339] ADGR ¶¶33, 35 [CB/A/3/149-150].

[340] The Government has before recognised that the concern is to identify risk that is more than purely theoretical. In announcing the SELC, the Government stated: *"While the Government recognises that there are situations where transfers must not take place, as set out in the following Criteria, we will not refuse a licence on the grounds of a purely theoretical risk of a breach of one or more of those Criteria*".

[341] ADGR ¶¶33, 39 [CB/A/3/149-150].

[342] ADGR ¶34 [CB/A/3/149].

6(3); that would create a perverse incentive for states wilfully to fail to consider material evidence, so as to continue exporting weapons: see ¶227.4 above.

231.2. The subsequent practice confirms that "*knowledge*" includes constructive knowledge (Article 32 VCLT), as evident from the Voluntary Guide to the ATT, endorsed by the states parties to the ATT.[343]

231.3. It is also supported by leading commentators.[344] The ATT Commentary describes the knowledge requirement "*as a test related to what a state can be expected to know*".[345] Per da Silva and Neville: "*it would be contrary to the object and purpose of the ATT and a breach of Article 6(3) if it did not include cases where the contracting party must have known, even if it claims otherwise, that the arms would be used for genocide, etc* […]. [e.g.] *where the circumstances are notorious and widely known, or there was a due diligence failure to check readily available and credible information (e.g. information published by reliable sources) or the State official had reasonable suspicions as to, e.g. crimes against humanity but turned a blind eye*".[346] The ICRC confirms that knowledge means "*what a State Party knows about the likely behaviour of the recipient, based on the facts at its disposal at the time it authorizes the weapons transfer*" and "*what a State Party can normally be expected to know, based on information in its possession or reasonably available to it*".[347]

232. **Third**, and consequential upon the first two points above, the Defendant misdirected himself that the Article 6(3) threshold is much higher than a clear risk of serious IHL

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[343] ATT Voluntary Guide, ¶¶41-42, 56. The ATT Voluntary Guide records that most states interpreted knowledge as "*as (sufficiently) reliable facts or information that are available to the State at the time it authorizes the transfer of arms*", some states indicated that knowledge included "*information that the State is aware of or should (normally) have been aware of ('and thus establishes an obligation to actively seek out information')*", and other states indicated that it included information that could be reasonably obtained, that was public, facts at the state's disposal at the time of the authorisation, "*information in its possession or that is reasonably available to*" the state party, facts or information "*that are or become available at the time of assessing the authorization request'* and *"information that is 'normally expected to be known by the importing States*". There was also reference to a need to assess the current and past behaviour of the recipient. On the ATT Voluntary Guide being endorsed by the states Parties, see the Executive Summary ("*endorsed by States Parties at the Tenth Conference of States Parties*").

[344] Article 38(1)(d), ICJ Statute.

[345] The ATT Commentary at ¶6.82.

[346] da Silva and Neville, "Article 6: Prohibitions" in da Silva and Wood (eds), *The Arms Trade Treaty: Weapons and International Law* (Intersentia, 2021), pp. 133-134.

[347] ICRC, "Understanding the Arms Trade Treaty" (2016), available at: https://icrcndresourcecentre.org/wp-content/uploads/2016/11/4252_002_Understanding-arms-trade_WEB.pdf, pp. 26 and 29; ICRC's expert presentation at the Sub-working Group on Articles 6 &7 of the ATT (26 April 2022) that formed the basis for the ATT Voluntary Report: cited at ¶¶53-54, ATT Voluntary Report and available at https://thearmstradetreaty.org/hyper-images/file/ICRC_Kick-off%20remarks%20on%20Art%206.3_WGETI%20SubWG%20on%20Arts%206&7_26.04.2022/ICRC_Kick-off%20remarks%20on%20Art%206.3_WGETI%20SubWG%20on%20Arts%206&7_26.04.2022.pdf

violations and/or that the Article 6(3) threshold was not capable of being met on a finding of clear risk: he asserts that *"[t]he UK has assessed that there is a 'clear risk' that Israel might commit a serious violation of IHL, but that is a much lower threshold than actual knowledge*" (emphasis added),[348] an error which is replicated in the underlying decision-making documentation.[349] That approach was erroneous for the following reasons.

232.1. Even on the Defendant's own case, it is premised on circular logic. On the one hand, he concludes that clear risk is too low a threshold to satisfy Article 6(3). On the other hand, after concluding that there have been possible violations of IHL, such that there is a 'clear risk' of further serious violations of IHL,[350] he does not consider it necessary to go any further, i.e. assess the risk of exported items being used in the commission of genocide, crimes against humanity or certain war crimes (*viz* the prohibitions relevant to Article 6(3)). That leads to a position where a contravention of Article 6(3) becomes impossible, which is a strong indication that the Defendant has erred in law. [351]

232.2. In particular, given that the Defendant did not understand the 'clear risk' finding of itself to engage Article 6(3), his failure to go any further than assessing a clear risk of serious violations of IHL constituted a clear failure to conduct the risk assessment exercise that Article 6(3) required. Without carrying out any further risk assessment, the Defendant could not know whether Article 6(3) was engaged and therefore could not comply with it. This failure was laid bare in the original DGR (see 219 above), which stated, inter alia that the "*there was no need to seek further to finesse or calibrate that clear risk*" of serious IHL violations.[352] The Defendant therefore failed

[348] ADGR ¶34 [CB/A/3/149].
[349] The July 2024 SELC 1 Assessment (Annex E) (Exhibit RP2-1c) [CB/E/35/609].
[350] Some of which were obviously serious violations of IHL and war crimes, despite no acknowledgement of that matter by the Defendant: see fn 255.
[351] It would also appear to give no place to Article 6(3) in a SELC analysis, despite the fact that the relevant ATT provisions must be assessed through the lens of SELC: see, for example, the fact that the SELC are intended to give effect to the ATT (¶104 above). Article 6(2) ATT is relevant to SELC 1; Article 6(3) is relevant to SELC 1 and SELC 2(c); Article 7(1)(b) is relevant (as regards IHL) to SELC 1 and SELC 2(c); and to the extent peace and security considerations are reflected in the ATT, they relate to SELC 3-4 (*cf* ADGR ¶44 [CB/A/3/152-153]).
[352] DGR, 20 December 2024, ¶¶14(c)-(d) (emphasis added), which has now been removed from the ADGR. It is also implicit in the Defendant's position on Ground 12, i.e. that he did not need to go beyond an assessment of whether or not there was a clear risk to carry out a lawful assessment. This is an implicit concession that, whatever the substance of the exercise carried out purportedly under Article 6(3) was, it did not involve a risk assessment beyond that already carried out in relation to SELC 2(c).

to assess whether he had knowledge of a relevant risk of genocide, crimes against humanity or specified war crimes so as to engage Article 6(3).[353]

233. In any event, the Defendant's position on the distinction between Article 6(3) and the 'clear risk' conclusion is wrong. As follows from the errors addressed in the first two points above, a conclusion that Israel is not committed to complying with IHL and that there is a 'clear risk' (satisfying the Criterion 2(c) threshold) that exported F-35 parts might be used to commit or facilitate a serious violation of IHL can satisfy the requirement of knowledge in Article 6(3) if the Defendant's finding is of a clear risk of one of the atrocity crimes listed in Article 6(3). The Defendant misdirected himself in determining that Article 6(3) was not capable of being met on his conclusion that there was a 'clear risk' that F-35 parts might be used by Israel to commit a serious violation of IHL.

(2) The Defendant's assessment of his own knowledge

234. The Defendant cannot assert that he did not possess the requisite knowledge (whether actual or constructive) to engage Article 6(3).[354] Any asserted absence of knowledge is entirely reliant upon his own his failure to conduct the relevant risk assessment required by Article 6(3) — i.e. it arises as a result of his decision to stop at the point of making a generalised clear risk assessment, thereby failing to determine whether the evidence before him was such as to constitute or give him "*knowledge*" that specified wrongs would be committed so as to engage Article 6(3), rather than merely to raise the "*potential*" of serious violations (so as to engage Article 7 instead). That failure cannot absolve him of the duty to comply with Article 6(3).

235. The Defendant's denial of knowledge also relies on his broader methodological failings that led to a purported inability to make specific findings of certain serious violations of IHL.[355] Yet the Defendant argued that such evidence and/or methodology was not

[353] See also 218 above. This appears to be confirmed by the statement in the July 2024 SELC 1 Assessment (Annex E) (Exhibit RP2/1c)[CB/E/35/609] that the Seventh IHLCAP Assessment (24 July 2024) and Israel's lack of commitment to complying with IHL do not "*provide actual knowledge*" for the purpose of Article 6(3). The use of the word *"provide"* is strongly indicative of an underlying view that the answer to the question posed by Article 6(3) should be expected to be answered directly by the contents of the Seventh IHLCAP Assessment; in other words, that no further evaluation or analysis was required. That error is all the more glaring in circumstances where the Defendant has chosen to design the assessment process around an inferential assessment of Israel's commitment to IHL, which would appear even to hinge SELC 1 assessments on the existence of a 'clear risk' of IHL conclusion.
[354] ADGR ¶40 [CB/A/3/150-151].
[355] Which were the subject of the Claimant's Grounds 2-5.

relevant to the Claimant's grounds 8-13, and the Court accepted that.[356] The Defendant cannot now rely on that same evidence and/or methodology to make good an assertion that he had no "knowledge" of those serious violations, including whether they constituted war crimes or crimes against humanity, for the purpose of Article 6(3): such reliance would be plainly wholly unfair to the Claimant, the Claimant having been precluded from arguing its case on these points.

236. In any event, the Defendant *did* have material before him evidencing the requisite knowledge (whatever the precise faming of the test — i.e. sufficient information or reasonable grounds to believe or substantial grounds to believe or a real risk[357]) that one or more of the specified crimes would be committed. This is clearly evidenced from material before the Defendant or of which he ought to have been aware, in particular:

236.1. **The ICC Prosecutor's application for ICC Arrest Warrants in respect of Israel's Prime Minister and (now former) Defence Minister for war crimes and crimes against humanity**. This is relevant in two distinct respects.[358] **First**, there is no consideration in Annex E of the *cumulative* effect, for the purposes of the Article 6(3) analysis, of the application for the ICC Arrest Warrants and the Defendant's conclusion that there is a clear risk that arms exported to Israel might be used to commit a serious violation of IHL. The analysis of the ICC Prosecutor's request for Arrest Warrants in the June 2024 SELC 1 Assessment (¶11) [SB/E/102/1425] is not updated in Annex E. Annex E simply states: "*Having carefully reviewed the information and analysis contained in the current IHL assessment, and the broader position, there have been no changes or developments that alter ECJU-FCDO's overall conclusions*" [CB/E/35/609].[359] This is despite the June 2024 SELC 1

[356] DGR, 20 December 2024, ¶¶14(e); Judgment of Mr Justice Chamberlain dated 30 January 2025 at ¶¶ 41-50 [CB/B/11/262-263].
[357] See ¶230.4 above.
[358] An application is made (and granted) on the basis of "*reasonable grounds to believe*" that the person has committed the crimes listed therein (Article 58, Rome Statute). The warrant was ultimately issued for the Israeli Prime Minister and Former Defence Minister by Pre-Trial Chamber I on 21 November 2024: https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges. The Defendant suggests this is a lower standard than constructive knowledge (ADGR ¶40(a) [CB/A/3/150-151]) but that is not correct based on the above discussion of the knowledge threshold. On 13 December 2024, the ECJU commented that the ICC's conclusions on there being reasonable grounds to believe Prime Minster Netanyahu and former Defence Minister Gallant committed war crimes and crimes against humanity "*demand respect*", "*track HMG's longstanding serious concerns*" in relation to humanitarian aid and "*corroborates out extant assessments that there is a clear risk*" in respect of "*intentionally directing attacks against civilians*" [SB/H/195/3069].
[359] The level of risk would require the UK to arrest the sitting Prime Minister of Israel (when such arrest warrants are issued, per the UK's obligations under the Rome Statute) but, on the Defendant's analysis, is not sufficient to stop the export of F-35 components to Israel.

Assessment's finding on knowledge of war crimes being predicated on the lack of a finding of clear risk of serious violations of IHL and the SSFCA having subsequently come to a diametrically opposite conclusion on that very question of clear risk (the June 2024 SELC 1 Assessment had posited that "*if it is assessed there is currently no clear risk that items might be used to commit or facilitate a serious violation of IHL (including all grave breaches) under C2c, it is not the case the UK has actual knowledge its items will be used to commit grave breaches*").[360] **Second**, there is no consideration of the totality of the material before the Defendant, including his conclusion on clear risk, with reference to the specific war crimes / crimes against humanity cited in the application for the ICC Arrest Warrants.[361] This failing is all the more glaring in circumstances where the June 2024 SELC 1 Assessment records that "*we do share some of the concerns outlined by the prosecutor, namely around poor humanitarian access*"[362] (which concerns had also been expressed in the Government's decision-making documents since late 2023[363]). The Defendant's plea that the application for the arrest warrants was not of itself determinative because it involves a different test (ADGR ¶40(a) [CH/A/3/150-151]) is therefore not an answer.

236.2. **Numerous UN statements and reports, including in particular the UN Commission of Inquiry Reports published in early June 2024**. This concluded that through its "*total siege*", Israel weaponised the withholding of life-sustaining necessities (including humanitarian assistance) for strategic and political gains, which constituted collective punishment and reprisal against the civilian population in direct violation of international humanitarian law. It also found that Israel's use of "*starvation as a method of war*" would affect the entire population of the Gaza Strip

[360] [SB/E/102/1430].
[361] Being: starvation of civilians as a method of warfare as a war crime contrary to article 8(2)(b)(xxv) of the Rome Statute; wilfully causing great suffering, or serious injury to body or health contrary to article 8(2)(a)(iii), or cruel treatment as a war crime contrary to article 8(2)(c)(i); wilful killing contrary to article 8(2)(a)(i), or murder as a war crime contrary to article 8(2)(c)(i); intentionally directing attacks against a civilian population as a war crime contrary to articles 8(2)(b)(i), or 8(2)(e)(i); extermination and/or murder contrary to articles 7(1)(b) and 7(1)(a), including in the context of deaths caused by starvation, as a crime against humanity; persecution as a crime against humanity contrary to article 7(1)(h); other inhumane acts as crimes against humanity contrary to article 7(1)(k*). Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine* 20 May 2024.
[362] ¶11 [SB/E/102/1425].
[363] First IHLCAP Assessment dated 10 November 2023 (Exhibit CH2-12) at [SB/E/44/587] notes "*... the lack of adequate humanitarian access";* Second IHLCAP Assessment dated 20 November 2023, (Exhibit CH2-17) see ¶30 [SB/E/46/639]; Third IHLCAP Assessment (Out of Cycle Assessment) dated 30 November 2023 (CH2-8) see ¶25 [SB/E/49/669]; Fourth IHLCAP Assessment dated 29 December 2023 (Exhibit CH2-25) ¶¶9, 18 [SB/E/61/813, 815].

for decades to come, with particularly negative consequences for children.[364] The Government disregarded such evidence principally on the basis that it was unable to verify the allegations due to limitations in accessing information in Israel's possession (i.e. its long-standing methodological error in assessing Israel's conduct) and also raised a narrow point concerning partial and potentially misleading quotations.[365] Yet there was no *cumulative* assessment of this report alongside the finding of clear risk, nor the Prosecutor's application for ICC Arrest Warrants — despite those warrants including the war crime of using starvation as a method of warfare[366] — for the purpose of assessing whether the Article 6(3) was engaged.

236.3. **The ICJ conclusions in *South Africa v. Israel* that there is a real and imminent risk of irreparable prejudice to the plausible rights of Palestinians not to be subject to acts of genocide**.[367] Consequent on the Defendant's error of law in failing to ask the central question of whether there was a relevant risk specifically of the prohibited conduct under Article 6(3), there was no consideration by the Defendant of the relevance of the ICJ determination to the risk-analysis required by Article 6(3), in light of the SSFCA's conclusion on clear risk.

(3) The Defendant's "very small" likelihood argument

237. Following amendment of the DGRs, the Defendant advanced an argument that "*a broad analysis shows that the likelihood of UK manufactured components ending up in existing*

[364] Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, 14 June 2024, UN Doc A/HRC/56/26, ¶102. See also the more detailed report into specific attacks that informed the summary report: Commission of Inquiry, Detailed findings on the military operations and attacks carried out in the Occupied Palestinian Territory from 7 October to 31 December 2023 (10 June 2024, issued on 12 June 2024) A/HRC/56/CRP.4, ¶¶274-299, 300-340, 451. Indeed, since the September Decision, more UN bodies have found that war crimes, crimes against humanity and genocide are actually being committed by Israel in Gaza: Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, 11 September 2024, UN Doc A/79/232, ¶¶89, 91, 94-95, 98, 100, 102, 105, 107-110 (as regards war crimes and crimes against humanity); Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, UN Doc. A/79/363, 20 September 2024, ¶69 (Israel's policies and practices since October 2023 "*were consistent with the characteristics of genocide*"); Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, 13 March 2025, UN Doc A/HRC/58/CRP.6, ¶178 ("*The Commission concludes that the ISF caused serious bodily and mental harm to members of this group, and deliberately inflicted conditions of life that were calculated to bring about the physical destruction of Palestinians in Gaza as a group, in whole or in part, which are categories of genocidal acts in the Rome Statute and the Genocide Convention*").

[365] IHL Seventh Assessment, 24 July 2024, (¶¶81-82) [CB/E/41/711]; ADGR ¶40(b) [CB/A/3/151].

[366] See https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state.

[367] *South Africa v. Israel*, Provisional Measures, Order of 26 January 2024, ¶¶35 and 74.

Israeli F-35 is very small", relying on the Witness Statement of Keith Bethell.[368] The argument is wrong and/or the Defendant cannot rely on it for the following reasons.

238. **First**, the "*very small*" likelihood argument was not the basis of the September Decision. In relation to Article 6(2), as noted above, Annex E went no further than expressing the view that there had been no material developments since the June 2024 SELC 1 Assessment: a conclusion that reveals very little *except* that the reasoning was certainly *not* based on "*the likelihood of UK manufactured components ending up in existing Israeli F-35*". In relation to Article 6(3), the analysis, as set out above, makes no reference to any such reasoning.

239. **Second**, the argument itself appears to betray a misunderstanding of Article 6 of the ATT, specifically a misunderstanding of the risk being assessed: it is the risk of the end use occurring which is relevant to the analysis. Put differently, even if the risk of UK manufactured parts ending up in Israeli F-35s were only "*very small*" (which is denied), that would suffice to meet the Article 6(3) threshold in circumstances where the UK has knowledge that Israel would use F-35s to commit one or more of the international crimes listed in Article 6(3).

240. **Third**, the relevance of the distinction between existing and new F-35s is not understood. The question is as to the assessment of risk posed to Palestinians in Gaza by Israeli F-35 fighter jets, whether that is via new or existing planes.

241. **Fourth**, the argument is not made out on the facts, for the reasons set out above in relation to CA1: ¶212.

(v) Article 7

242. Article 7 only arises if the transfer does not breach Article 6. It applies where: (i) the evidence of genocide, crimes against humanity or war crimes is not sufficiently clear cut to engage the Article 6(3) strict prohibition (i.e. is insufficient to establish the requisite "knowledge", Article 7 being concerned with 'potentiality' (per Article 7(1)); (ii) the risk is of the *facilitation* rather than *commission* of such an atrocity crime; and/or (iii) the risk is of the commission *or* facilitation of a serious violation of IHL that does

[368] ADGR ¶¶ 28(a), 31(c), 40(b), 63(c) [CB/A/3/148-149, 151, 157-158]; Reliance is not placed on s.31(2A) or (3C) of the Senior Courts Act 1981. The Witness Statement of Keith Bethell at ¶20 [CB/D/26/565] does not refer to existing Israeli F-35s, while the ADGR does. Israel received three new F-35s in March 2025 (see ¶45 above).

not amount to a crime listed in Article 6, or (iv) of a serious violation of IHRL (or an act constituting a terrorism or organised crime offence). Article 7 therefore encompasses a wider range of negative consequences arising from arms transfers than Article 6. It also requires states to consider the potential *positive* contribution of an export to peace and security.

243. **First**, subsequent practice interpreting the ATT is uniformly against the Defendant's approach and interpretation.

243.1. The ATT Voluntary Guide (which the states parties to the ATT as a whole endorsed[369]) records that states interpret the phrase "*overriding risk*" to mean one of the following: "*substantial risk*"; "*clear risk*"; "*high potential*"; "*'very likely' or 'more likely than not' to occur even after the expected effect of any mitigating measure has been considered*";

243.2. Canada has implemented Article 7 by domestic legislation providing that a transfer shall not be authorised "*if the Minister determines there is a substantial risk that the brokering or export of the goods or technology would result in any of the negative consequences described above*"; [370]

243.3. New Zealand stated that it would interpret the concept of overriding risk as "*substantial*" risk;[371]

243.4. Liechtenstein's position is that "*the term 'overriding risk' in Article 7, paragraph 3, entails, in light of the object and purpose of the ATT and in accordance with the ordinary meaning of all equally authentic language versions of this term in the ATT, an obligation not to authorize the export whenever the State Party concerned assesses the likelihood of any of the negative consequences set out in its paragraph 1 materializing as being higher than the likelihood of them not materializing, even*

[369] See ATT Voluntary Guide, Executive Summary ("*endorsed by States Parties at the Tenth Conference of States Parties*").
[370] Section 7.4 of the Export and Import Permits Act RSC 1985 E019, available at https://laws-lois.justice.gc.ca/eng/acts/e-19/FullText.html.
[371] da Silva and Wood, "Article 7" in Wood and da Silva (eds), *Weapons and International Law: The Arms Trade Treaty* (Intersentia, 2013), p. 170.

when having considered the expected effect of any mitigating measures", with the applicable regime in Lichtenstein (and Switzerland) reflecting that analysis;[372] and

243.5. Per the adoption statement of 98 states at the UN General Assembly: "*Any transfer that has the potential to lead to negative consequences, such as serious violations of human rights or international humanitarian law, shall not be authorized*".[373]

243.6. None of the above formulations allow for a contribution to peace and security to be balanced against a clear risk of the arms being used to commit serious violations of IHL, much less for the former to prevail against the latter. The Defendant has not been able to point to any state practice, *any prior interpretations by the United Kingdom* or anything else of substance to support its interpretation of Article 7 of the ATT. The Defendant cites the French version of the text (ADGR ¶44(h) [CB/A/3/153]) but the Arabic version of the text, which is also an authentic version of the treaty,[374] uses a word that means 'great' or 'substantial', that does not imply any form of 'balancing'.

243.7. The EU's longstanding position is that the 'clear risk' threshold reflects and implements the 'overriding risk' threshold in Article 7(3): see ATT Voluntary Guide;[375] User's Guide;[376] and the recent judgment of the Hague Court of Appeal in the *Oxfam* case.[377] The UK has adopted the 'clear risk' threshold for Criterion 2(c)

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[372] Article 5 and 20 of the Swiss Federal Act on War Material, which applies in Lichtenstein: see Lichtenstein's Initial ATT Report of 19 May 2016 at section 3, available at https://thearmstradetreaty.org/download/37a0dd9c-d62c-36aa-b2ae-640644e4f29a . See also the Swiss Interpretation Declaration for the ATT, which states: "*It is the understanding of Switzerland that the term "overriding risk" in Article 7, paragraph 3, encompasses, in light of the object and purpose of this Treaty and in accordance with the ordinary meaning of all equally authentic language versions of this term in this Treaty, an obligation not to authorise the export whenever the State Party concerned determines that any of the negative consequences set out in paragraph 1 are more likely to materialise than not, even after the expected effect of any mitigating measures has been considered"*, available at https://www.newsd.admin.ch/newsd/message/attachments/38166.pdf.

[373] Adoption of the ATT by the General Assembly Political Declaration delivered by Mexico on behalf of 98 states, 2 April 2013, available at https://controlarms.org/wp-content/uploads/2018/04/Mexico.pdf.

[374] See fn 320 above.

[375] ATT Voluntary Guide, ¶39.

[376] Both the 2015 and 2019 version of the *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment* record that the obligations set out in the Common Position are consistent with Article 7(3) of the ATT: p. 55, 10858/15 (2015 version); p. 56, 12189/19 (2019 version).

[377] *Oxfam (and others) v the Netherlands* at ¶3.10: "*The EUGS* [Common Position] *was adjusted in 2019 in connection with (among other things) the implementation of the Arms Trade Treaty. The court deduces from this that, in the Council's opinion, there are no substantive differences between the Arms Trade Treaty and the EUGS after that adjustment. The parties apparently also assume this. They made no distinction between the substantive provisions of the EUGS and those of the Arms Trade Treaty. In the following, the court therefore assumes that the parts of art. 2 paragraph 2 EUGS and art. 7 Arms Trade Treaty are in accordance with each other and that the 'clear risk that military goods to be exported will be used in the commission of serious violations of international humanitarian law'(EUGS) does not differ in content and scope from the 'overriding risk' that the military goods to be exported '*

since at least 2008 (while an EU Member State) on the basis of the EU Common Position. Therefore, the UK currently adopts 'clear risk' as a threshold for Criterion 2(c) on the basis of an EU position that interprets Article 7 of the ATT.

244. **Second**, moreover, the Defendant's approach to Article 7 is contrary to the proper interpretation of Article 7 and the process it envisages:

244.1. The centrepiece of Article 7 is that a state party, after following the process described, comes to a conclusion as to the *risk* of the negative consequences in Article 7(1) eventuating. That process involves: (i) an assessment of the potential that conventional arms or items would contribute to or undermine peace and security, and the potential that they could be used (as relevant in the present case) to commit or facilitate a serious violation of IHL or IHRL; (ii) a consideration of measures capable of mitigating any negative risks ("*such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States*"); and then (iii) looking at the results of those analyses and drawing a conclusion in terms of Article 7(3) as to whether the risk remains 'overriding'. The relevance of 'peace and security' is that it is a "*relevant factor*" to be taken into account at step (i) of the analysis, on par with the factors relating to the potential for use in the commission or facilitation of IHL or IHRL violations; it is not a permanent weight on the scales for a balancing activity at step (iii) of the analysis. Step (iii) in the analysis, concerning Article 7(3), concerns a conclusion to be drawn as to the state of the risk following the analyses at steps (i) and (ii); it is not concerned with a balancing exercise as contended by the Defendant.

244.2. Put differently, a state *cannot* "*contribute to*" peace and security by providing the means for the commission of a serious violation of IHL or IHRL. Consequently, if, at step (iii), it finds an overriding risk of such a violation, it cannot supply the means by which such a violation might be committed. Thus: (i) the preamble to the ATT reaffirms that "*peace and security, development and human rights are pillars of the United Nations system and foundations for collective security*" and that "*development, peace and security and human rights are interlinked and mutually reinforcing*"; and (ii) Article 1 confirms the ATT's purpose to "*[r]educ[e] human*

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could be used to commit or facilitate a serious violation of international humanitarian law' (Arms Trade Treaty). When the court hereafter refers to the EUGS, this must also be understood as the Arms Trade Treaty, unless the context indicates otherwise."

suffering". That indicates precisely the opposite of the Defendant's submission at ADGR ¶44(f) [CB/A/3/153].

244.3. On the Defendant's approach, the Defendant instead *first* comes to a conclusion on the risk of exporting a given item, i.e. clear risk of a serious violation of IHL; and *then* layers in counterweights that are not directly relevant to the risk of exporting the given item, but which he contends nonetheless justify the transfer of the item. That misunderstands the nature of the analysis mandated by Article 7(1). The question is the potential that *the export* itself (i) would contribute to or undermine peace and security and/or (ii) could be used to commit or facilitate a serious violation of IHL or IHRL. If the risk remains overriding, notwithstanding mitigation measures considered, then the export is to be prohibited.

244.4. This interpretation of Article 7 conforms squarely with the SELC: (i) SELC 2 provides that the Government will not grant a licence if it determines that there is a clear risk of a violation of IHL and/or IHRL; while (ii) SELC 3 and SELC 4 provide that the Government will *additionally* not grant a licence if it determines that the export would undermine peace and security. None of these criteria permit the Defendant to 'balance' a contribution to peace and security against a risk that arms could be used to commit a serious violation of IHL or IHRL: they are alternative (and distinct) reasons for prohibiting exports. The correct interpretation is that a state party is entitled to have regard to peace and security (and additionally not to export if an item would not positively contribute to peace and security, even if other negative consequences were absent and/or could be mitigated),[378] but not for the purposes of balancing that against the risks of negative consequences under Article 7(1).

244.5. There is also no indication in the Defendant's analysis of mitigating measures being considered on the determination of clear risk. That is a mandatory requirement of Article 7(2) that the Defendant failed to take into account.

245. **Third**, were the Defendant's interpretation to be accepted, the practical consequence would be to render the ATT ineffectual and discriminatory. On the facts of this case, the Defendant's position amounts to an argument that one group of people can lawfully be subjected to a risk of a serious violation of IHL (and/or IHRL) and the consequences

[378] See Amended Reply ¶44(e) [CB/A/4/206-207].

thereof, by a state assessed not to be complying with or committed to IHL, in order purportedly to ensure peace and security generally or for another entirely distinct group of people in other parts of the world. That would be an extraordinary position for the Defendant to adopt, which would not only be contrary to the express terms of Article 7(1) which require that Article to be complied with in "*an objective and non-discriminatory manner*",[379] but also to the universality of fundamental rights.

246. Finally, the Defendant also erred in relation to Article 7 because he failed (i) properly to consider Article 7 at all; (ii) to conduct an assessment of the risk that exports made pursuant to the F-35 Carve Out could be used to commit or facilitate a serious violation of IHRL, as required under Article 7(1)(b)(ii) (of particular relevance in this context were the rights to life and to food,[380] and the prohibitions on cruel, inhuman and degrading treatment and torture[381] — such assessment was critical, in particular, in circumstances where the Defendant had concluded that Israel was not complying with its obligations in relation to humanitarian assistance and the treatment of detainees); and (iii) failed to take into account the risk of F-35 parts being used to commit or facilitate serious acts of violence against women and children, as required pursuant to Article 7(4) (notwithstanding clear evidence of large numbers of women and children being violently killed).[382] Neither the June 2024 SELC 1 Assessment nor Annex E include Article 7 of the ATT in the list of relevant legal obligations: see ¶3 at [SB/E/102/1422] and [CB/E/35/610] respectively. Neither are the relevant considerations addressed in substance. This was a mandatory relevant factor which required consideration and received none. That amounted to a fundamental error in the Defendant's assessment of compliance with Criterion 1 and in his self-direction of compliance with the UK's international legal obligations.

247. For completeness, the Defendant has failed to establish that, had he not misdirected himself in the ways set out above in this Ground 8(B), it would have made no difference for the purposes of Section 31(2A) or (3C) of the Senior Courts Act 1981.

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[379] ATT, Articles 5(1) and 7(1), and see also preamble, final 'principle' ("*Implementing this Treaty in a consistent, objective and non-discriminatory manner*").
[380] ICCPR Article 6(1) (right to life); ICESCR Article 11(1) (right to food). The applicability of the ICCPR in the oPT was most recently recorded by the ICJ in the *Second oPT Advisory Opinion*, ¶¶97-100). The applicability of ICESCR Article 11(1) in the oPT was specifically recorded by the ICJ in *2004 oPT Advisory Opinion*, ¶¶130-134, and the applicability of ICESCR in the oPT generally was confirmed in *Second oPT Advisory Opinion*, ¶¶97-100.
[381] As reflective of customary international law, and enshrined in UNCAT (ratified by the UK on 20 May 1976 and by Israel on 3 October 1991) and ICCPR Article 7 (ratified by the UK on 20 May 1976 and by Israel on 3 October 1991).
[382] See e.g. [SB/E/85/1041, 1064]; [SB/E/56/772-773]; [SB/E/67/893]. See further obligations under CRC Article 6.

F. GROUND 8C: INCOMPATIBILITY WITH THE UK'S INTERNATIONAL LEGAL OBLIGATION TO PREVENT GENOCIDE UNDER ARTICLE I OF THE GENOCIDE CONVENTION AND CUSTOMARY INTERNATIONAL LAW

248. In relation to the Genocide Convention, the Defendant erred in law in two respects: first, in relation to the substance of the obligation to prevent genocide, pursuant to Article I of the Convention and customary international law, and second, in his assessment of whether Israel's conduct gave rise to a serious risk of genocide.

(i) The Defendant erred in considering that the UK's conduct could not be inconsistent with the obligation to prevent genocide without genocide having occurred

249. Article I of the Genocide Convention imposes on the UK an obligation to prevent genocide, which binds the UK as a matter of treaty[383] and customary international law.[384] A state's obligation to prevent, and the corresponding duty to act, arise at the instant that the state learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.[385] From that point in time the state has a duty to "*employ all means reasonably available to them, so as to prevent genocide so far as possible*". [386]

250. It follows that the F-35 Carve-Out *viz* the continued export of military parts for use by a state committing or at risk of committing genocide — is inconsistent with the UK's obligation to prevent genocide: ceasing supply of military parts for use by a state committing or at risk of committing genocide is unquestionably and obviously a reasonably available means that *must* be employed *as soon as* the obligation to prevent genocide is engaged.[387] Accordingly the only question relevant to whether the continued

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[383] The UK is a state party to the Genocide Convention, see the UNTS entry available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4.

[384] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, ¶95 (referring to the "*obligation under customary international law to prevent those acts [genocide] from occurring*"); see also *Reservations to the Genocide Convention, Advisory Opinion*, I.C.J. Reports 1951, p. 23 (the "*principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation*").

[385] *Bosnia Genocide*, ¶431; *Nicaragua v. Germany Order*, ¶23.

[386] *Bosnia Genocide*, ¶431; *Nicaragua v. Germany Order*, ¶23. The content of the obligation to prevent genocide is notably absent from the Defendant's decision-making documents.

[387] Presumably in recognition of the fact that "*all means*" must be employed *as soon as* the obligation is triggered, the Defendant does not make his "*very small*" risk argument regarding UK-exported F-35 parts ending up in "*current*" Israeli planes in relation to Ground 8(C) which he makes in relation to Grounds 8(A), (B) and (D).

export of F-35 parts was "*consistent with*"[388] the obligation to prevent genocide for the purpose of SELC 1 and the Defendant's self-direction, was whether that obligation was engaged.

251. The essence of the Defendant's case in response is that the obligation to prevent genocide by preventing the supply of weapons capable of being used to commit or facilitate genocide is not engaged unless and until genocide occurs and/or until there has been a conclusive determination of genocide by a court.[389] Until such time, the Defendant says, Article I of the Genocide Convention imposes no duty on it at all with respect to its arms transfers with which it could act inconsistently.

252. This misreading of the Convention is also evident in the underlying decision-making documentation: while the June 2024 SELC 1 Assessment correctly stated that the obligation to prevent genocide is "*engaged when the UK is aware or should have been aware that there is a 'serious risk that genocide will occur'*",[390] it went on to assess Israel's conduct only to the extent that genocide had in fact occurred,[391] apparently on the rather circular basis that "*technically, a determination that this duty has been violated cannot be made until genocide actually occurs*".[392] The conclusion that "*Israel <u>is not</u> harbouring genocidal intent*"[393] (irrespective of whether there was nonetheless a serious risk of genocide, which is the true test[394]) was then the basis for the Defendant's

[388] SELC 1; Letter from Defendant's Principal Private Secretary to SSFCDA's Principal Private Secretary (Exhibit RP2-6) [CB/C/18/284].
[389] ADGR ¶49 [CB/A/3/154], ¶54 [CB/A/3/155] ("*no international court or tribunal has found that genocide has been committed by Israel*"; "*this Court would need to determine that genocide has actually been committed*").
[390] Exhibit CH2-49 ¶4 [SB/E/102/1422-1423]. This passage also referred to a need for the UK to have "*sufficient influence to contribute to the prevention of the genocide*". On arms exporting states being particularly influential (cf. ADGR ¶56(a) [CB/A/3/155]) see: CAAT I CA, ¶121: "*Arms producing and exporting states can be considered particularly influential in 'ensuring respect' for international humanitarian law due to their ability to provide or withhold the means by which certain serious violations are carried out. They should therefore exercise particular caution to ensure that their export is not used to commit serious violations of international humanitarian law*". The same reasoning necessarily applies to genocide.
[391] Exhibit CH2-49 (¶¶12-13) [SB/E/102/1425] accepting that (i) conduct capable of constituting the physical elements of genocide was taking place in Gaza; and (ii) identifying the relevant question as whether such conduct was accompanied by genocidal intent — that is to ask whether genocide *is* occurring, not whether there was a *serious risk* of genocide occurring. This is notwithstanding the reference to "*risk*" in ¶13. See also CH2-49 ¶9 [SB/E/102/1424-1425]: "*the evidence does not demonstrate that Israel's conduct in the conflict, including action in Rafah, amount to genocide*", ¶19 [SB/E/102/1427]: "*our assessment [is] that Israel is not harbouring genocidal intent*" and ¶ 22: "*to not necessarily demonstrate genocidal intent*", ¶25 [SB/E/102/1428]: "*has not demonstrated genocidal intent*".
[392] Exhibit CH2-49, ¶4 [SB/E/102/1422-1423]; ADGR ¶49 [CB/A/3/154], ¶54 [CB/A/3/155].
[393] Exhibit CH2-49, ¶19 [SB/E/102/1427] (emphasis added). This approach was replicated in Annex E to the ECJU Submission to SSFCDA 24 July 2024, which assessed genocidal intent afresh by asking whether Israel "*<u>is</u> harbouring genocidal intent*" (emphasis added) (Exhibit RP2-1c), [CB/E/35/609-610].
[394] Or more specifically in the present case, whether there was a serious risk of Israel possessing genocidal intent, that being the only outstanding element given the physical elements of genocide were accepted (see fn 391 above).

conclusion that the F-35 Carve Out was *"consistent with"* the obligation to prevent genocide.

253. The Defendant appears to suggest that the UK is permitted to supply weaponry where there is a serious risk that it could be used in the elimination of an entire human group provided a court has not yet conclusively determined that genocide has occurred. Such an interpretation undermines the very purpose of the duty to prevent genocide, rendering it devoid of any practical or protective effect in circumstances where the Defendant: (i) asserts in parallel that conclusive findings of genocide require "*a very difficult exercise, which could take many years*";[395] and (ii) has himself taken no steps to obtain any such judicial determination at the international level, while actively opposing such determination at the domestic level.[396] The Defendant's approach is plainly wrong for the following reasons.

254. **First**, the short point is that the Government's proposed interpretation — which would permit weapons to be exported for use in the commission or facilitation of genocide — is wholly contrary to the object and purpose of the Genocide Convention.[397] The Convention's title confirms its focus on *prevention.* It was "*manifestly adopted for a purely humanitarian and civilizing purpose*" — namely to *"safeguard the very existence of certain human groups and* […] *to confirm and endorse the most elementary principles of morality*".[398] The ICJ has confirmed treaty parties' "*duty not to deprive [a treaty] of its object and purpose*".[399]

255. **Second**, it is irreconcilable with the very nature of the obligation to *prevent* genocide, which necessarily arises *before* genocide occurs.[400] Indeed, the Defendant's proposed interpretation would render meaningless the fact that the obligation arises when a state *ought to have known* of the serious risk of genocide.[401]

255.1. As the ICJ in *Bosnia Genocide* explained: "[to find that] *the obligation to prevent genocide only comes into being when perpetration of genocide commences* […]

[395] ADGR ¶54 [CB/A/3/155].
[396] ADGR ¶54 [CB/A/3/155] ("*no international court or tribunal has found that genocide has been committed by Israel*"; "*this Court would need to determine that genocide has actually been committed*").
[397] VCLT, Article 31(1).
[398] *Reservations to the Genocide Convention, Advisory Opinion*, p. 23; *Bosnia Genocide*, ¶161.
[399] *Nicaragua v. USA*, ¶280; see also ¶275 ("*certain activities* […] *are such as to undermine the whole spirit of a[n]* […] *agreement*").
[400] The same is the case for the obligation to prevent any of the other acts under Article III (*Bosnia Genocide*, ¶166).
[401] *Bosnia Genocide*, ¶432 ("*it is enough that the State was aware, or should normally have been aware*").

would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed".[402] Once the obligation is triggered, the "*due diligence*" obligation requires a state to "*employ all means reasonably available*" to prevent genocide as far as possible and thus "*do their best to ensure that such acts do not occur*".[403] The ICJ further explained that "*it is clear that the obligation in question is one of conduct and not one of result*",[404] and that consequently "*a violation of the obligation to prevent results from mere failure to adopt and implement suitable measures to prevent genocide from being committed*".[405] This conforms squarely with the general definition of breach in Article 12 of the ASR, which does not imply any requirement beyond (even partial) non-conformity with a state's own primary obligations. [406]

255.2. The ICJ in *Bosnia Genocide* further made clear that even where UN organs (such as the ICJ) are seized, "*this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring*".[407] In line with that clear position, the ICJ in *Nicaragua v. Germany* "*consider*[ed] *it particularly important to remind all States of their international obligations relating to the transfer of arms to parties to an armed conflict, in order to avoid the risk that such arms might be used to violate the* [Genocide] *Convention*[]" in circumstances where it had not yet ruled on the fact of a genocide occurring.[408]

256. **Third**, the Defendant's assertion is, moreover, not only contrary to the jurisprudence, it is also contrary to the UK's own submissions in other *fora*. The UK recently emphasised states' duty to take action in good faith prior to the commission of genocide in its submissions in *Ukraine v. Russia* before the ICJ, concluding that "*a State must act*

[402] *Bosnia Genocide*, ¶431.
[403] *Bosnia Genocide*, ¶¶430, 432 (emphasis added).
[404] *Bosnia Genocide*, ¶430.
[405] *Bosnia Genocide*, ¶432 (emphasis added).
[406] ILC, ASR, Article 12: "*There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation*" (emphasis added). The language of "*not in conformity with*" makes clear that even partial non-compliance will constitute a breach (commentary ¶2).
[407] *Bosnia Genocide*, ¶427.
[408] *Nicaragua v. Germany Order*, ¶24. See also Declaration of Judge Cleveland, ¶8 (Article I of the Genocide Convention and CA1 "*necessarily impose a duty on States parties to be proactive in ascertaining and avoiding 'the risk that such arms might be used to violate the* […] *Conventions*'").

diligently, reasonably and in good faith in carrying out an assessment of whether genocide is occurring or at serious risk of occurring".[409] The Government cannot advance in good faith different positions before domestic and international courts.

257. **Fourth**, in an attempt to deny this clear legal position in these proceedings, the Defendant relies on a misinterpretation of an isolated statement in *Bosnia Genocide*, namely that "*a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed*".[410] That statement self-evidently concerns the circumstances in which a court may hold a state responsible for the effects of its breach *a posteriori*. It does not, however, dictate when the obligation itself arises or what conduct it requires of the state when it is engaged. On those questions, the ICJ was clear, as made clear in passages quoted at ¶255.1 above. In other words, the sentence extracted by the Defendant from *Bosnia Genocide* refers to a *secondary* rule of international law (relating to responsibility for breach), not the primary obligation in question (the duty to prevent). SELC 1 and the Defendant's self-direction are concerned with the primary obligation: SELC 1 requires "[r]*espect for* […] *international obligations and relevant commitments*" and the Defendant's direction proceeded on the basis that the F-35 Carve Out was "*consistent with the UK's* […] *international obligations*". [411]

258. In summary, the UK's obligation under Article I of the Genocide Convention is engaged *as soon as* there is a serious risk of genocide, irrespective of whether the UK could yet be held responsible (and thus be required to make reparations) for a failure to prevent genocide. From that moment, the UK is required to employ "*all means*" reasonably available to prevent genocide, which obviously includes ceasing the export of military parts that might be used to commit or facilitate the genocide. A failure to suspend such exports is therefore inconsistent with the UK's obligation to prevent genocide. The Defendant nonetheless wrongly directed himself that the decision was "*consistent*" with "*international legal obligations*".[412]

[409] *Ukraine v. Russia*, Declaration of intervention of the UK, 5 August 2022, ¶57. See also ¶¶53-54.
[410] *Bosnia Genocide*, ¶431 (emphasis added); ADGR ¶50 [CB/A/3/154]. This was repeated (but always tied to responsibility) in *Croatia v. Serbia* and *Ukraine v. Russia* as quoted in ADGR ¶51-52 [CB/A/3/154-155].
[411] Letter from the Defendant's Principal Private Secretary to SSFCDA's Principal Private Secretary (Exhibit RP2-6) [CB/C/18/284] (emphasis added).
[412] Ibid, [CB/C/18/284].

(ii) The Defendant's limitations and misdirections in connection with the risk of genocide

259. As to the Defendant's bald assertion that "*there is no serious risk that genocide will occur on the facts and/or no evidence that genocide has been committed*",[413] the Court cannot treat this assessment as uncontested. It is highly contested but the Claimant has been precluded in these proceedings from challenging the methodology through which he arrived at this assessment. The same points as to the unfairness that arises from this approach made elsewhere apply with equal, if not more force, here: see above at ¶235.

260. Were the Court to entertain the Defendant's factual assertion, fairness would require that the Claimant be entitled to develop its full factual case as to why a conclusion that there was no serious risk that genocide would occur was wrong, including (i) on the basis of the evidence available to the Defendant generally; and (ii) because of the methodological errors that had been the subject of Grounds 2-5 of the Claimant's claim, in particular (a) the incomplete and flawed assessment of statements of intent to commit genocide by Israeli officials; and (b) the erroneous conclusion that it was not possible to assess whether Israel had deliberately targeted civilians absent direct evidence from Israel in relation to individual strikes. [414]

261. In any event, in circumstances where the Defendant proceeded on the basis of a misdirection as to the true legal test (as set out above), any factual submission on the existence of a serious risk of genocide can only possibly be relevant to the test under the Senior Courts Act s.31(2A) / s.31(3C). In other words, the Defendant would be seeking to show that it is highly likely that the same decision would have been made because, following a lawful assessment (not vitiated by the errors identified in the Claimant's previous pleadings), he would have concluded that there was no serious risk of genocide. That is not an argument in which the Defendant can succeed.

262. In any event, even setting aside errors predicated on methodological flaws in assessing Israeli statements and IHL compliance, the Defendant misdirected himself in assessing whether there was a serious risk of genocide. The approach of the June 2024 SELC 1

[413] ADGR ¶55 [CB/A/3/155].
[414] Exhibit RP2-1c [CB/E/35/609-610].

Assessment as set out at [SB/E/102/422-1428] (and adopted in the 24 July 2024 ECJU Submission [CB/E/35/609]) was as follows:

262.1. It examined the ICJ provisional measures orders in South Africa v. Israel and Nicaragua v. Germany and found that they did not give rise to a serious risk of genocide, as the ICJ's findings that "*the ICJ's findings leading to the grant of Provisional Measures do not automatically equate with a finding that there is a 'serious risk' that genocide or other prohibited acts will occur*". [415]

262.2. It then assessed whether genocide was *actually* occurring by asking whether genocidal intent could be inferred from Israel's statements and conduct, including "*possible*" IHL breaches.[416] Given the subsequent change in assessment as to Israel's commitment to comply with IHL, the July 2024 SELC 1 Assessment (Annex E) purported to re-assess whether Israel possessed genocidal intent by (i) examining a limited number of recent Israeli statements, and (ii) addressing the asserted lack of evidence that Israel was "*making civilians the object of attack*" or "*deliberately targeting civilian women [or] children*", concluding that there was no evidence that Israel "*is harbouring genocidal intent*". [417]

263. This approach was marred by a series of errors. **First**, the Defendant erred in misinterpreting the ICJ's provisional measures orders in South Africa v. Israel. Accordingly, he failed to appreciate that the serious risk threshold had been found by the Court to have been met.

263.1. The conclusion of the ICJ on 26 January 2024 (and reaffirmed on 28 March 2024 and 24 May 2024) was that there existed "*a real and imminent risk*" that "*irreparable prejudice*" will be caused to the rights of Palestinians to not be subjected to genocide.[418] In circumstances where *any* infringement of the rights of Palestinians

[415] Exhibit CH2-49 [SB/E/102/1423-1425].
[416] Exhibit CH2-49 [SB/E/102/1425-1428]. As addressed at Section VI.F.(i) above, this was the wrong question for the purpose of ascertaining whether there was a serious risk of (not commission of) genocide.
[417] Exhibit RP2-1c [CB/E/35/609-610]. It is noteworthy that by 13 December 2024, the ECJU appears to have accepted the ICC's position on there being reasonable grounds to believe that Israel may have intentionally directed attacks against civilians: "*[t]he ICC also concluded, on the evidence available to it, that there were reasonable grounds to believe Israel may have intentionally directed attacks against civilians in relation to two of the incidents referred by the prosecutor. Again, this corroborates our extant assessment that there is a clear risk items might be used to commit or facilitate a serious violation of IHL in the conduct of hostilities*" [SB/H/195/3069].
[418] South Africa v. Israel, Provisional Measures, Order of 26 January 2024, ¶¶74-75. This Order was transmitted to all members of the UN SC — of which the UK is a permanent member — on 26 January 2024: Letter dated 26 January 2024 from the Secretary-General addressed to the President of the Security Council, UN Doc S/2024/116.

not to be subjected to genocide constitutes genocide, a finding of a "*real and imminent risk*" of "*irreparable prejudice*" is tantamount to a finding of serious risk of genocide.

263.2. This is confirmed by the ICJ's Order considering it necessary to require Israel — and, by extension, given the *erga omnes* nature of the obligation, all states — to employ all means reasonably available to prevent genocide.[419] See similarly the Court's reminder in *Nicaragua v. Germany* to all states of their obligation under the Genocide Convention in respect of arms transfers to Israel, noted above (at ¶255.2).

263.3. By the March 2024 Order, the position was so clear that Judge Yusuf in his Separate Opinion highlighted the seriousness of the risk of genocide: "*[t]he alarm has now been sounded by the Court. All the indicators of genocidal activities are flashing red in Gaza*". [420]

263.4. The Defendant's assertion that the ICJ only found that the rights are "*plausible*", not that the commission of genocide is "*plausible*"[421] is misconceived and leads him wrongly to compare a "*plausibility*" threshold with that of "*serious risk*". The relevant finding by the Court for present purposes is thus not plausibility, but the real and imminent risk of irreparable harm to the right not to be subjected to genocide, i.e. the serious risk of genocide. Indeed, while the Defendant purports to rely on an extra-curial statement by the former President of the ICJ that the Court "*didn't decide that the claim of genocide was plausible*" [SB/E/102/1423], he failed to consider that she had subsequently explained that the Court had found "*a risk that the right of this Palestinian population to be free of genocide would be harmed irreparably before the Court delivered its judgment*".[422]

263.5. The Defendant also failed to take into account evidence relevant to the ICJ's decision, including statements and actions by states such as Germany[423] and South

[419] *South Africa v. Israel*, Order of 26 January 2024, ¶86(1).
[420] *South Africa v. Israel*, Order of 28 March 2024, Declaration of Judge Yusuf, ¶12.
[421] ADGR ¶¶57 and 40(c) [CB/A/3/151, 156].
[422] Donoghue, Behind the Bench with ICJ's Former President Joan Donoghue, Berkley Law Border Lines (3 June 2024) (emphasis added).
[423] *Nicaragua v. Germany*, Verbatim Record 2024/16, 37 (the obligation was one "*of conduct that is incumbent upon all States*" and that, in that context, it was continuously using all reasonable means at its disposal to exert its influence on Israel in order to improve the situation).

Africa[424] that the obligation to prevent genocide was triggered, and reports of international bodies expressing concern about and calling on states to take action to prevent genocide. [425]

264. **Second**, in addition to determining as a consequence of his flawed methodology that "*no evidence has been seen that Israel is deliberately targeting civilian women [or] children*"[426] (no assessment is made in relation to civilian men), the Defendant failed to take into account that genocidal intent can be inferred from conduct other than the targeted killing of civilians, a matter which is of significant relevance to the facts of this case. Indeed, the UK's submissions to the ICJ in *The Gambia v. Myanmar* stressed that genocide is not limited to killings and other forms of genocide must be considered.[427]

264.1. The Defendant failed in particular to consider Israel's (at least possible[428]) violations in respect of humanitarian relief that had been repeatedly found.[429] The context in which those violations took place was particularly relevant, including the "*disastrous humanitarian situation*" and "*catastrophic living conditions*"[430] to which the population of Gaza were being subjected.[431] The Defendant excluded[432]

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[424] On 29 May 2024, South Africa provided to all UN Security Council members a dossier urging urgent action to prevent genocide, on the basis of extensive evidence: Letter dated 29 May 2024 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council, UN Doc S/2024/419.

[425] UN Committee on the Elimination of Racial Discrimination, Decision 2 (2023), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCERD%2FEWU%2F9942&Lang=en (found that Israel's actions "*raise[d] serious concerns regarding the obligation of Israel and other State parties to prevent crimes against humanity and genocide*"; "*call[ed] upon all State parties […] to cooperate to […] prevent atrocity crimes, particularly genocide*"); Human Rights Council, *Resolution adopted by the Human Rights Council on 5 April 2024*, A/HRC/RES/55/28, https://undocs.org/A/HRC/RES/55/28 ("*expresse[d] grave concern at statements by Israeli officials amounting to incitement to genocide, and demands that Israel uphold its legal responsibility to prevent genocide and fully abide by the provisional measures issued*").

[426] Exhibit RP2-1c [CB/E/35/609].

[427] Joint Declaration of Intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, 15 November 2023 ("Joint Declaration, *The Gambia v. Myanmar*") available at: https://www.icj-cij.org/sites/default/files/case-related/178/178-20231115-wri-01-00-en.pdf, ¶¶23-25.

[428] See CH2/¶19 [SB/B/12/84]. Following the approach taken in the *CAAT II*, "*incidents that fall into category (1)* [i.e. a possible breach] *are treated as constituting a violation of IHL for the purpose of assessing Israel's record of past compliance with IHL*".

[429] IHL Seventh Assessment, 24 July 2024, ¶108 [CB/E/41/720], ¶131 [CB/E/41/726], ¶137 [CB/E/41/726 referring (at ¶¶22-23 [CB/E/41/696] and ¶92 [CB/E/41/716]]) to the last two IHL Assessments: Fifth IHL Assessment CH2-34 ¶26(i) [SB/E/74/931], ¶56 (unredacted) [SB/E/74/941], ¶77 [SB/E/74/947]; Sixth IHL Assessment, CH2-39 [SB/E/83/991-1018]. See further earlier findings of possible breaches in Third IHL Assessment ('Out of Cycle Assessment') ¶31 CH2-8 [SB/E/49/671-672]; Fourth IHL Assessment CH2-25 ¶24 [SB/E/61/816]. Articles 23 and 55 are reflective of custom: ICRC, CIHL Rule 55.

[430] *South Africa v. Israel,* Order of 24 May 2024, ¶¶27-28.

[431] See, in particular, Minogue 4 Part I ¶¶3 to 70 [CB/D/22/299-336] and Minogue 5 [CB/D/25/531-556].

[432] See also RPS-1c/014: "*the areas of most acute concern with respect to compliance with IHL [i.e. humanitarian relief and detainees] do not relate to Israel making civilians the object of attack*" and so were wrongly presumed not to be relevant (emphasis added).

consideration of whether these matters indicated a serious risk of genocide committed by "*[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*". [433]

264.2. The Defendant similarly failed to have regard to the repeated forced displacement of Palestinians, despite the possibility of such displacement constituting a "*significant factor*" which, "*in parallel to acts falling under Article II of the Convention may be 'indicative of the presence of a specific intent*".[434] That is notwithstanding the UK's own position in its intervention in *The Gambia v. Myanmar* in the ICJ underscoring the relevance of forced displacement to the inference of genocidal intent. [435]

265. **Third**, the Defendant failed to take into account statements by senior Israeli officials that are relevant to establishing genocidal intent. It is plainly insufficient to merely assert that "*[i]t is not possible to define clearly what may be political rhetoric for a domestic audience and what speaks to the conduct of the campaign*",[436] particularly when the statements are repeated by senior Israeli officers commanding soldiers in Gaza and those soldiers themselves, and are reflected in the effects of the campaign.[437] Moreover, the June 2024 SELC 1 Assessment was wrong to state that apart from Minister of National Security Ben Gvir and Minister of Finance Smotrich (who were curiously assessed to have little influence, given that they were at that time in Israel's Security Cabinet, which collectively determines strategic goals and military objectives and provides policy guidelines[438]) "*senior government figures have not made such inflammatory comments since the start of the conflict*".[439] The Annex E assessment was similarly wrong to conclude that "*concerning Israeli statements seen towards the start of the conflict have not been repeated in the same vein*".[440] At that date:

265.1. The Prime Minister had continually referenced one of the goals of the military operation — distinct from "*eliminating Hamas*" — as "*ensuring that Gaza never*

[433] Genocide Convention, Article II(c).
[434] *Croatia v. Serbia*, ¶434 (emphasis added). See also *Prosecutor v. Tolimir* (Case No. IT-05-88/2-A), Appeal Judgment, 8 April 2015, ¶254. Similarly in *Bosnia Genocide*, the Court recognised that "*acts of 'ethnic cleansing' may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent*".
[435] Joint Declaration, *The Gambia v. Myanmar*, ¶¶72-74.
[436] First IHLCAP Assessment dated 10 November 2023 (Exhibit CH2-12) [SB/E/44/588].
[437] See Tables of Statements of Israeli government and military personnel at Exhibit DM4-15 [SB/F/156/2356-2439] DM4-16 [SB/F/157/2440-2453] and DM 5-1 [SB/F/163/2556-2568].
[438] See https://en.idi.org.il/articles/51509.
[439] Exhibit CH2-49, (¶14) [SB/E/102/1425-1426].
[440] Exhibit RP2-1c [CB/E/35/609].

again constitutes a threat to Israel" (emphasis added), further stating, "*[w]e will not withdraw the IDF from the Gaza Strip and we will not release thousands of terrorists. None of this will happen. What will happen? Total victory*".[441]

265.2. The then-Minister of Defence, Yoav Gallant confirmed that the military was "*taking apart neighbourhood after neighbourhood*".[442]

265.3. Other members of the Security Cabinet had stated "*Uninvolved? Big-time involved! We will reckon with the third circle of Gazans as well — the same ones who rejoiced and cheered the massacre*";[443] and "*The tens of thousands of welcomers who were waiting in Gaza for their heroes* […] *whom some define as 'uninvolved.' Each and every one of these many thousands is a terrorist for all intents and purposes. His blood will be on his head and the pursuit of him will be until his last day in prison or in the grave*";[444] and advocated for reducing humanitarian aid to Gaza.[445]

265.4. High-ranking military officials supported "*a war on Gaza. In all of Gaza!* […] *because all of Gaza is one big terror, including the bathers on the beach*";[446] stated: "*There are no civilians in this war*";[447] and called to "*not allow humanitarian supplies and the operation of hospitals within Gaza City*".[448]

266. **Fourth**, the Defendant failed take into account the fact that genocidal intent can arise alongside independent motives. The June 2024 SELC 1 Assessment suggested that Israel was withholding humanitarian relief (and inflicting related conditions of life) in

[441] Israel Prime Minister's Office, PM Netanyahu to the Students of the Bnei David Institutions in Eli: "The testament of the fallen is our mission – total victory" (30 January 2024), https://www.gov.il/en/departments/news/event-visit300124 (in part at Exhibit DM4-15 entry 16 [SB/F/156/2358-2359]). See generally, Letter dated 29 May 2024 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council, UN Doc S/2024/419, pp. 20-22.
[442] Exhibit DM4-15 entry 99 [SB/F/156/2378], also in Letter dated 29 May 2024 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council, UN Doc S/2024/419, p. 24.
[443] Exhibit DM4-15 entry 41 [SB/F/156/2364], also in Letter dated 29 May 2024 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council, UN Doc S/2024/419, p. 37.
[444] Exhibit DM4-15 entry 37 [SB/F/156/2363], also in Letter dated 27 February 2025 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council (28 February 2025), UN Doc S/2025/130, https://docs.un.org/en/S/2025/130, p. 94.
[445] Exhibit DM4-15 entry 217 [SB/F/156/2404], also in Letter dated 29 May 2024 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council, UN Doc S/2024/419, p. 25.
[446] Exhibit DM4-15 entry 38 [SB/F/156/2363], also in Letter dated 29 May 2024 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council, UN Doc S/2024/419 p. 52. See generally pp. 47-76 in that letter regarding statements by members of the military.
[447] Exhibit DM4-15 entry 43 [SB/F/156/2365], also in Letter dated 29 May 2024 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council, UN Doc S/2024/419, p. 54.
[448] Exhibit DM4-15 entry 227 [SB/F/156/2405], also in Letter dated 29 May 2024 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council, UN Doc S/2024/419, p. 51.

order to pressure Hamas to release hostages, and that this necessarily precluded the existence of genocidal intent.[449] That is wrong as a matter of law. It is not necessary that destruction of the Palestinian people be the *sole* motivator for Israel's conduct.[450] Indeed, individual motives may support an inference of genocidal intent when these motives are consistent with an intent to destroy the group.[451]

267. Each of the above errors arose alongside to the Defendant's fundamental misdirection, addressed above,[452] that the question was not whether there was a *serious risk* of genocide, but instead whether genocide *was occurring*.

G. GROUND 8D: INCOMPATIBILITY WITH THE UK'S CUSTOMARY INTERNATIONAL LAW OBLIGATIONS NOT TO AID OR ASSIST THE COMMISSION OF AN INTERNATIONALLY WRONGFUL ACT AND NOT TO RENDER AID OR ASSISTANCE IN MAINTAINING A SITUATION CREATED BY A SERIOUS BREACH OF A PEREMPTORY NORM

(i) The Defendant's failure to take into account his customary international law obligations reflected in Articles 16 and 41 ASR

268. Despite being aware that exports could constitute aiding and assisting the commission of an internationally wrongful act,[453] the Defendant failed to have regard in his decision-

[449] CH2-49/901 (¶21) [SB/E/102/1427].

[450] See e.g. Prosecutor v. Jelisić, Appeal Judgment, ¶49 ("*The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide*"); Croatia v. Serbia, Separate Opinion of Judge Bhandari, ¶50 ("*genocidal intent may exist simultaneously with other, ulterior motives*"); Croatia v. Serbia, Dissenting Opinion of Judge Cançado Trindade, ¶144 ("*it has been pertinently warned that perpetrators of genocide will almost always allege that they were in an armed conflict, and their actions were taken 'pursuant to an ongoing military conflict'; yet, 'genocide may be a means for achieving military objectives just as readily as military conflict may be a means for instigating a genocidal plan'*"). See also Second oPT Advisory Opinion, ¶205 (*mutatis mutandis,* "*[w]ith respect to the question of the potential justification of Israel's differentiation in treatment, the Court has taken note of Israel's security concerns […] To the extent that such concerns pertain to the security of the settlers and the settlements, it is the Court's view that the protection of the settlers and settlements, the presence of which in the Occupied Palestinian Territory is contrary to international law, cannot be invoked as a ground to justify measures that treat Palestinians differently*"); Second oPT Advisory Opinion, Separate Opinion of Judge Tladi, ¶40 (*mutatis mutandis* as regards apartheid: "*it is not necessary for the purpose of establishing 'the purpose of domination' for domination to be the sole, or even dominant reason, for the discriminatory measures. Apartheid South Africa, it will be recalled, promoted its policy not solely for the purpose of domination, but to ensure what it termed 'equal but separate development'*" and see also ¶44 "*security interests as such, no matter how serious or legitimate, cannot override rules of international law*").

[451] Mettraux, *International Crimes: Law and Practice: Volume I: Genocide* (OUP, 2019) p. 244 (citing the ICTR Appeal Chamber in *Kayishema & Ruzindana* at ¶160).

[452] Section VI.F.(i).

[453] See e.g. Second IHLCAP Assessment (Exhibit CH2-17) [SB/E/46/635] (¶2 "The IHL assessment process was set up to service three key requirements: […] 3) ensuring HMG's overarching support to Israel does not aid or assist the commission of an internationally wrongful act").

making to the compliance of the F-35 Carve Out decision with his relevant obligations in customary international law specified in the ASR, including:

268.1. the customary law obligation as reflected in Article 16 not to aid and/or assist the commission of an internationally wrongful act, including a breach of fundamental rules of IHL. These were particularly relevant in circumstances where the Defendant was proceeding on the basis that Israel had breached[454] relevant provisions of international law in Gaza and was not committed to complying with IHL;[455] and

268.2. the customary law obligation as reflected in Article 41 not to aid and/or assist in the maintenance of a situation created by a serious breach of one or more peremptory norms. As relevant to the present facts, these include basic rules of IHL (see ASFG ¶¶100-104 [CB/A/2/64-72], ¶233 [CB/A/2/118-119] and *CAAT CA* at ¶¶23-25), genocide (see ASFG ¶116 [CB/A/2/76-77]), torture (see ASFG ¶233 [CB/A/2/118-119]), and the denial, impairment and frustration of the right to self-determination, including as a result of Israel's unlawful presence in the occupied Palestinian territory (*Second oPT Advisory Opinion*, ¶233; ASFG, ¶233 [CB/A/2/118-119])).

269. There is no evidence at all in OPEN of the Defendant having assessed the compatibility of the Carve-Out with these legal obligations. Nor has the Defendant raised any argument to the contrary: instead, he denies that the relevant legal obligations have been breached on the interpretations he advances, as addressed below.

(ii) Incompatibility of the F-35 Carve-Out with the UK's customary international law obligations as reflected in Article 16 ASR

270. As the wording of Article 16 ASR indicates,[456] a state acts inconsistently with its customary obligation where: (i) it provides aid or assistance to a state committing an internationally wrongful act; (ii) it transfers this aid with knowledge of the circumstances of the internationally wrongful act; and (iii) the act would have been wrongful if done by the assisting state.

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[454] CH2/¶19 [SB/B/12/84]. Following the approach taken in the *CAAT II*, "*incidents that fall into category (1)* [i.e. a possible breach] *are treated as constituting a violation of IHL for the purpose of assessing Israel's record of past compliance with IHL*".

[455] Including Articles 23 and/or 55, as well as Articles 76 and 143 of the Fourth Geneva Convention: see fn 255.

[456] *"A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."*

271. The foregoing requirements are met in circumstances where:

271.1. The UK continues to authorise the export of F-35 components to the F-35 Programme in the knowledge that Israel is participating in the Programme.

271.2. The UK is doing so knowing that there is a clear risk that the F-35 components are, or might be used, to commit or facilitate serious violations of IHL

271.3. Such violations would be unlawful if committed by the UK.

272. The Defendant's contentions to the contrary are without any merit.

273. **First,** the Defendant wrongly contends that "*it has not been established that Israel is committing any internationally wrongful acts*" (ADGR ¶62 [CB/A/3/157], emphasis added). This assumes that the customary law obligation reflected in Article 16 has no application unless and until there is a judicial determination that Israel's acts were internationally wrongful. That is not a correct approach, as confirmed by the ILC in the ASR itself,[457] and by Lord Mance in *Belhaj v Straw*:[458] the assessment is to be made by the aiding or assisting state for itself.[459] On the facts of this case, applying his approach to the assessment of the compliance of licenced exports with the SELC more generally, the Defendant had concluded that it was necessary to proceed on the basis that Israel was in breach of IHL, treating its findings of possible breaches as breaches.[460] The UK's obligation under Article 16 was capable of being engaged on that basis; and the Defendant erred in failing to consider that obligation.

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[457] ILC, ASR, commentary to Article 16, ¶11 ("*States are entitled to assert complicity in the wrongful conduct of another State even though no international court may have jurisdiction to rule on the charge*").

[458] *Belhaj v Straw*, ¶77 (Lord Mance) ("*A régime which insisted on the actual actor being sued first would attach jurisdictional significance to a factor which would not normally have this significance and which might distort the natural course of events: a state aiding or assisting, and certainly a state procuring, directing, controlling or coercing, … might be the more culpable party and natural target than the actual actor* […] *It would make recourse against the appellants dependent upon the operation, in the present case, of up to four separate foreign court systems*").

[459] The UK frequently affirms the right to itself assess whether an internationally wrongful act has occurred. See e.g., its sanctions regime, where the UK has "*imposed and implemented sanctions in situations where the UN has chosen not to act, but where the UK has considered an international response was still necessary*" (explanatory memorandum to the Sanctions and Anti-Money Laundering Act 2018); https://www.gov.uk/government/publications/application-of-international-law-to-states-conduct-in-cyberspace-uk-statement/application-of-international-law-to-states-conduct-in-cyberspace-uk-statement ("*differing viewpoints on such issues* [involving what amounts to a prohibited intervention] *should not prevent States from assessing whether particular situations amount to internationally wrongful acts and arriving at common conclusions on such matters")*. See also https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century.

[460] As noted above, the "*possible*" breach findings are treated as breaches for the purpose of the Government's assessment: CH2/¶19 [SB/B/12/84], following *CAAT II.*

274. To the extent the Defendant's case is instead that his customary obligation not to provide aid or assistance to another state in the commission of an internationally wrongful act does not apply because he had not reached a firm conclusion on Israel's compliance with IHL, that is an argument which cannot succeed in circumstances where his failure to reach a settled conclusion was entirely a consequence of his own methodological errors. The Court accepted the Defendant's position that methodological errors identified by the Claimant were irrelevant to the present grounds, following an assertion by the Defendant that no change in methodology would have affected the outcome of the September Decision: he cannot now seek to rely on those very errors to avoid the UK's obligations in the ASR, or to defeat the Claimant's claim in this regard.

275. **Second,** the customary obligation articulated in Article 16 in any event only requires "*knowledge of the circumstances of the internationally wrongful act*", i.e. awareness of the circumstances in which the aid or assistance would be used by the receiving state,[461] *not* knowledge that an internationally wrongful act will certainly occur. This is satisfied where the assisting state has "*credible evidence of present or future illegality*".[462] The Defendant's conclusion that Israel is not committed to complying with IHL, and that there was a clear risk of F-35 components being used to commit internationally wrongful acts, necessarily means that it had knowledge of the relevant circumstances. In any case, as acknowledged by the UK Parliament's Joint Committee on Human Rights, constructive knowledge is sufficient for complicity. [463]

276. **Third,** the Defendant contends that the contribution must constitute "*substantial involvement*" in the wrongful act (ADGR ¶63 [CB/A/3/165-166]), a threshold which he argues is not met on the facts. Article 16 does not specify any such threshold, and the Defendant's argument appears to instead rely on an erroneous interpretation of a statement in the commentary to Article 16 to the effect that "*[t]here is no requirement that the aid or assistance should have been essential* […] *it is sufficient if it contributed*

[461] ILC, ASR, commentary to Article 16, ¶4: "*the circumstances making the conduct of the assisted State internationally wrongful*"; Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Bloomsbury, 2020), p. 100.
[462] See Moynihan, "*Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*" at ¶43, available at: https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf.
[463] Joint Committee on Human Rights, *Allegations of UK Complicity in Torture* (2008–09) HL Paper 152 HC 230 ¶35: "*complicity means simply one State giving assistance to another State in the commission of torture, or acquiescing in such torture, in the knowledge, including constructive knowledge, of the circumstances of the torture which is or has been taking place*."

significantly to that act" (emphasis added).[464] The commentary does not thereby suggest that some high threshold of involvement is required: indeed, it expressly makes clear, to the contrary, that the assistance's role in the commission of the act need only be incidental or minor.[465] In any event, the Defendant's suggestion that there is a threshold which is not met is unsustainable in circumstances where: (i) Israel is relying heavily on F-35s in its attacks on Gaza,[466] requires spare parts to service existing F-35s, and is indeed expanding its fleet (¶45 above); and (ii) the UK is a unique supplier of critical F-35 parts (which account for 15% of the value of each new aircraft) (¶43.1 above).

277. **Fourth**, the Defendant asserts that the customary law obligation as framed in Article 16 includes an additional requirement of intent (ADGR ¶65 [CB/A/3/158]), on the basis that the commentary states that "*aid or assistance must be given with a view to facilitating the commission of the wrongful act*". That is incorrect.

277.1. Article 16 makes clear that "*knowledge of the circumstances of the internationally wrongful act*" is sufficient — not intent. Put differently, the state must provide aid despite it being foreseeable that it will be used for the commission of an internationally wrongful act.[467] The commentary seeks to elaborate on those terms but cannot alter the substance of the customary international law obligation, and indeed later confirms that the reference to "*knowledge*" in Article 16 means "*notice of the commission of a serious breach by another State*".[468] No evidence of an additional requirement of intent emerges from state practice;[469] and indeed such a requirement would be inconsistent with the general exclusion of fault/intent from the ASR and the specific exclusion of intent from the terms of Article 16.[470] Moreover, given the near-impossibility of proving a state's true purpose or intention, adding this

[464] ILC, ASR, commentary to Article 16, ¶5.
[465] ILC, ASR, commentary to Article 16, ¶10: "*the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered*".
[466] See CAB2, in particular ¶¶3 to 18 [CB/D/27/569-576]. See also 'Israeli Air Force Press Release' dated 13 March 2025 (Exhibit CAB2-2) [SB/f/168/2746] *"[the F-35] has even conducted an airstrike in Judea and Samaria [i.e. the West Bank]*".
[467] Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Bloomsbury, 2020), p. 100; ILC, ASR, commentary to Article 16, ¶4.
[468] ILC, ASR, commentary to Article 41, ¶11.
[469] Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Bloomsbury, 2020), p. 101.
[470] Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Bloomsbury, 2020), pp. 101-102; ILC, ASR, commentary to Article 2, ¶10.

requirement would render the customary international law obligation provided for under Article 16 illusory. [471]

277.2. Even if (contrary to the plain wording of Article 16) some form of intent is required, the term "*facilitate*" in the commentary does not require that the assisting state intend to "*collaborate*" in the commission of an internationally wrongful act (as asserted by the Defendant at ADGR ¶65 [CB/A/3/158]). Rather, any necessary degree of intent may be imputed where aid or assistance is given with certain or near-certain knowledge as to its intended use to commit an internationally wrongful act.[472] This is clear from Bosnia Genocide in which the ICJ required that "*at the least the organ or person acted knowingly, that is to say, in particular, was aware of the specific intent* […] *of the principal perpetrator*". [473]

277.3. Moreover, even if the Defendant's proposed interpretation of the customary law obligation were to be applied, it would be satisfied here: (i) the UK has concluded that Israel *is not committed to complying with IHL*, including in its conduct of hostilities and use of F-35 parts; and (ii) Israel's reliance on F-35s in its assaults on Gaza is extensive and well-known, with Israel recently receiving new F-35s and placing orders for more.[474] It follows that the UK intends for the F-35 components it supplies to be used in functional F-35 fighter jets, knowing Israel is and will continue to use such F-35 jets in its attacks on Gaza, and knowing Israel is not committed to complying with IHL, including in its use of those F-35s. As such, the continued supply of F-35 parts by the UK is done with at least near-certain knowledge as to their intended use in the commission of IHL violations. An interpretation of the customary law obligation not to aid and/or assist the commission of an internationally wrongful act that would exclude such a situation would devoid the obligation of any practical meaning or application.

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[471] *Lanovoy, Complicity and its Limits in the Law of International Responsibility* (Bloomsbury, 2020), pp. 101-102.
[472] Crawford, *State Responsibility*, p. 408, see also p. 407 ("*has arguably been accepted into the customary ambit of complicity by the International Court,* […] *in Bosnia Genocide* [in considering complicity under the Genocide Convention]") and Bosnia Genocide, ¶451 ("*at the least the organ or person acted knowingly, that is to say, in particular, was aware of the specific intent* […] *of the principal perpetrator*"), ¶432.
[473] Bosnia Genocide, ¶451 and see ¶432. Crawford, *State Responsibility*, p. 407 ("*has arguably been accepted into the customary ambit of complicity by the International Court, […] in* Bosnia Genocide"). The Defendant also relies on Bosnia Genocide and academic commentary in relation to it.
[474] See ¶45.

(iii) Incompatibility of the F-35 Carve-Out with the UK's customary international law obligations as reflected in Article 41 ASR

278. Article 41 ASR sets out the duty on a state not to aid or assist in the maintenance of a situation arising out of a serious breach of a peremptory norm of international law. Such a situation pertains on the facts of this case: the ICJ in the *Second oPT Advisory Opinion* affirmed that Israel's presence in the oPT is illegal and characterised by serious breaches of peremptory norms (including the annexation of territory and a continuing violation of the right of Palestinians to self-determination),[475] and that all states are obliged "*not to render aid or assistance in maintaining the situation created by Israel's illegal presence in the Occupied Palestinian Territory*".[476] Moreover, the authorisation of F-35 exports is, or would be, capable of maintaining Israel's unlawful presence in the oPT, including both Gaza and the West Bank.[477] As such, the provision of F-35 components constitutes unlawful aid and assistance.

279. Again, the Defendant does not assert that he considered this obligation in assessing the compliance of the F-35 Carve Out with his international obligations. Rather, he again relies on erroneous interpretations of the UK's relevant legal obligations:

279.1. First, he relies again upon his incorrect interpretation of Article 16, which he argues should be cross-applied to his customary law obligation as reflected in Article 41. The errors in that analysis are identified above. Indeed, it is clear from the ILC's commentary that the provision of assistance in circumstances where the UK has knowledge that breach/es of peremptory norms are occurring necessarily satisfies the requirements of Article 41; there is no requirement of any further intention to assist[478] (and the Defendant's assertion that "*it has not been shown that the UK intends* […] *to assist Israel to maintain that situation*" (*viz* the situation in the oPT) (ADGR ¶66 [CB/A/3/158-159]) is therefore irrelevant).

279.2. Second, the Defendant seeks to rely upon his professed intent that the F-35 components are to be used "*in an armed conflict in defence against a terrorist*

[475] *Second oPT Advisory Opinion*, ¶¶179, 233, 243.
[476] Ibid, ¶279.
[477] See, for example, CAB2/¶4 [CB/D/27/569], quoting from 'Israeli Air Force Press Release' dated 13 March 2025 (Exhibit CAB2-2) [SB/F/168/2746] ("[the F-35] *has even conducted an airstrike in Judea and Samaria* [i.e. the West Bank]"); "Israeli fighter jets bomb West Bank coffee shop, killing 18 Palestinians", *Middle East Eye*, 3 October 2024, available at https://www.middleeasteye.net/news/least-over-dozen-killed-massive-strike-tulkarm-occupied-west-bank.
[478] ILC, ASR, commentary to Article 41, ¶11.

organisation" (ADGR ¶67 [CB/A/3/159]). This is irrelevant to the assessment under Article 41: F-35s are used to maintain Israel's unlawful presence in the oPT, in violation of the right to self-determination and prohibition on annexation, and it is therefore a breach of the customary rule reflected in Article 41 to continue to provide their parts to Israel. The Defendant has not even attempted to impose any controls on the use to which Israel puts its F-35s.

H. THE "MAKES NO DIFFERENCE" ARGUMENT

280. For completeness, the Defendant has not adduced any evidence or made any argument that the above errors and misdirections in relation to Grounds 8(A) to (D) would have made no material difference such that relief should be denied pursuant to s.31(2A)/(3C) of the Senior Courts Act. He should not be permitted to do so at this late stage. This point is addressed for completeness and insofar as relevant to the Defendant's response, also at ¶¶206, 247, 260, 274.

VII. GROUND 9: MATERIAL MISDIRECTION / ERROR OF LAW IN DETERMINATION THAT THE F-35 CARVE OUT IS CONSISTENT WITH THE UK'S DOMESTIC LEGAL OBLIGATIONS

281. By Ground 9 the Claimant contends that:

281.1. The obligations relied upon for the purposes of Grounds 8A (the obligation to ensure respect for the Geneva Conventions), 8C (the obligation to prevent genocide), and 8D (the obligation not to facilitate internationally wrongful acts) constitute norms of customary international law.

281.2. Those norms have been received into and/or are essentially reflected in the common law.

281.3. The effect of such reception is that, absent statutory authorisation, the SSBT has no power (whether under the 2002 Act or at common law) to act in a manner which is inconsistent with those norms.

281.4. More specifically, these norms are apt to: (i) condition the scope of lawful action by public authorities (generally); and/or (ii) condition the scope of the SSBT's licensing powers under the 2002 Act; and/or (iii) govern the Court's assessment of the rationality of impugned administrative decisions (whether as a matter of process or

substance); and/or (iv) delimit the parameters of a "good reason" to depart from a policy or legitimate expectation

281.5. Far from there being statutory authorisation for any derogation from these norms in the present case, the statutory framework is designed to facilitate the UK Government's compliance with its international obligations (*a fortiori* the fundamental norms in issue here).

281.6. The F-35 Carve-out was premised on a material misdirection as to the status of these norms under domestic law and/or was inconsistent with one or more of those norms and therefore unlawful.

282. Further or in the alternative, if the first two points above are correct it follows that (i) the existence of a misdirection of the kind alleged in Ground 8 must be considered on a correctness standard;[479] and (ii) when considering s.31(2A), the counter-factual scenario must proceed on the basis that in the event of a breach of any of the relevant obligations there could be no question of balancing this against risks to international peace and security.

A. THE CUSTOMARY NATURE OF THE OBLIGATIONS RELIED UPON BY THE CLAIMANTS

283. The obligations relied upon for the purpose of Ground 8A, 8C and 8D bind the UK as a matter of customary international law, as well as treaty.

(i) Common Article 1

284. In relation to CA1, the ICJ held as long ago as 1986 in *Nicaragua v United States* that:

> there is an obligation on [states], in the terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in al1 circumstances", since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. [states are] thus under an obligation not to encourage persons or groups engaged in the conflict…to act in violation of the provisions of [customary rules of IHL].

[479] This is because compliance with the relevant norms would represent a legal constraint which operates directly as a matter of domestic law, whether to delimit the scope of the SSBT's lawful decision-making power or the scope of what may constitute a "good reason". In either case these limits will be for the court to determine by reference to the true content of the limit.

285. The ICJ has reaffirmed that position in two subsequent decisions: the 2004 oPT Advisory Opinion and the oPT Second Advisory Opinion: see ¶¶118-119 above.

286. The 2016 ICRC Commentary to the First Geneva Convention (and the 2020 ICRC Commentary to the Third Geneva Convention[480]) confirms, further, that:

> 120 The interpretation of common Article 1, and in particular the expression 'ensure respect', has raised a variety of questions over the last decades. In general, two approaches have been taken. One approach advocates that under Article 1 States have undertaken to adopt all measures necessary to ensure respect for the Conventions only by their organs and private individuals within their own jurisdictions. The other, reflecting the prevailing view today and supported by the ICRC, is that Article 1 requires in addition that States ensure respect for the Conventions by other States and non-State Parties. This view was already expressed in Pictet's 1952 Commentary. Developments in customary international law have since confirmed this view.
>
> [...]
>
> 126 In addition, according to the ICRC study on customary international humanitarian law, the obligation to respect and ensure respect is not limited to the Geneva Conventions but to the entire body of international humanitarian law binding upon a particular State.
>
> [...]
>
> 173 Accordingly, there is a positive legal duty to ensure respect for the Conventions, and this is widely supported by experts and scholars. It is in this sense that the corresponding customary duty to ensure respect for humanitarian law has been understood.[481]

287. In support of that view, the ICRC cites its own Study on Customary International Law (2005), which at Rule 144 provides:

> Rule 144. States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.

288. The ICRC provides extensive practice in support of that rule in Volume II of its study.[482] In addition to the practice set out there:

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[480] See ICRC Commentary to the Third Geneva Convention (2020), https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-1/commentary/2020?activeTab=1949GCs-APs-and-commentaries, ¶¶153, 159, 206.
[481] ICRC Commentary to the First Geneva Convention (2016), https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-1/commentary/2016?activeTab=1949GCs-APs-and-commentaries.
[482] https://ihl-databases.icrc.org/en/customary-ihl/v2/rule144#a149b055-e7b0-49e6-8c14-3eb389591435.

288.1. The User's Guide (reflecting the practice of EU states) provides:

> Common Article 1 of the Geneva Conventions is generally interpreted as conferring a responsibility on third party states not involved in an armed conflict to not encourage a party to an armed conflict to violate international humanitarian law, nor to take action that would assist in such violations, and to take appropriate steps to cause such violations to cease. They have a particular responsibility to intervene with states or armed groups over which they might have some influence. Arms producing and exporting states can be considered particularly influential in "ensuring respect" for international humanitarian law due to their ability to provide or withhold the means by which certain serious violations are carried out. They should therefore exercise particular caution to ensure that their export is not used to commit serious violations of international humanitarian law. (emphasis added)

288.2. UN HRC Resolution 24/35, which only the United States voted against (Kuwait, Mauritania, Qatar and the UAE having abstained) urged:

> …all States to refrain from transferring arms to those involved in armed conflicts when said States assess, in accordance with their applicable national procedures and international obligations and standards, that such arms are sufficiently likely to be used to commit or facilitate serious violations or abuses of international human rights law or international humanitarian law.

(ii) Duty to prevent genocide

289. Genocide has been described as the "*crime of all crimes"*. Its prohibition is foundational to the modern legal order. As the ICJ explained in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide in 1951:

> The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, inter se, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties. The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (1) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties

> to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States. The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.[483]

290. It is axiomatic that the prohibition on genocide is both a norm of customary international law and peremptory in character. The ICJ has made this clear on several occasions: see, for example, *Congo v Rwanda* I.C.J. Reports 2006 at ¶64 (noting the *jus cogens* nature of the prohibition on genocide) and *Croatia v Serbia* I.C.J. Reports 2015 at ¶87 (emphasising the customary and *jus cogens* nature of the norm).

291. The ICJ has also made clear that the duty to prevent genocide is customary. In *Bosnia Genocide, Preliminary Objections* (1996), when considering the territorial scope of the duty to prevent and punish genocide, the ICJ quoted the above passage from *Reservations to the Genocide Convention* (including that "*the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation*") and declared that the obligations "*enshrined in*" Article I of the Genocide Convention are binding on states *erga omnes*: see ¶31. The ICJ drew no distinction in this respect between the duty to prevent and the prohibition on genocide.[484] The two rules go hand in hand.

292. Even absent an independent norm of customary international law as to the prevention of genocide, the position would be analogous to that underpinning the prohibition against torture, in respect of which the courts — in recognition of the particular horrors of torture,[485] and of the *jus cogens* and *erga omnes* nature of the central prohibition —

[483] See pp. 23-24.
[484] In fact, it was not until the merits judgment in *Bosnia Genocide* (2008) that the ICJ confirmed that Article I (the duty to prevent and punish genocide) contains within it a prohibition on States committing genocide (see *Bosnia Genocide* I.C.J. Reports 2008, [166]). Comments as to the *erga omnes* nature of obligations in Article I made at the preliminary objections stage (1996) were therefore likely directed specifically at the duty to prevent genocide.
[485] Recognised also, and unsurprisingly, in respect of genocide: see ¶301 below.

have been willing to recognise ancillary rules of prevention as part of the common law even where these are not themselves customary: see *A v SSHD No. 2* [2006] 2 AC 221 , ¶¶34, 112.

(iii) Articles 16 and 41 of the ASR

293. The ASR are widely considered to *"represent the modern framework on state responsibility*".[486] The ICJ has acknowledged the customary nature of the rules relied upon by the Claimant in this case. For example:

293.1. In *Bosnia Genocide*: "*...reference should be made to Article 16 of the ILC's Articles on State Responsibility, reflecting a customary rule*".[487]

293.2. In the 2004 oPT Advisory Opinion: "*all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction*".[488]

B. RECEPTION INTO THE COMMON LAW

294. If the Court accepts the customary status of these norms, the question becomes whether they have been received into the common law in any of the respects identified above or are essentially reflected in it. As noted above, this is important (*inter alia*) because if the answer is "yes", the question of whether the SSBT has misunderstood and misapplied them — leading to an error of law vitiating the F-35 Carve-Out — unquestionably falls to be determined on a correctness standard.

295. The principles governing common law reception are settled and appear to be common ground. Rules of customary international law are taken to shape the common law unless there is some positive reason based on constitutional principle, statute law or common law that they should not: see *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2019] QB 1075 at ¶117, and *Ukraine v Law Debenture Trust Corp Plc* [2024] AC 411 to similar effect at ¶204. There is accordingly

[486] See *Crawford, State Responsibility: The General Part,* 2014; §2.1.1, p.45.
[487] *Bosnia Genocide,* ¶420.
[488] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 200 [159]. See also the decision of the Divisional Court in *R (Mohamed) v SSFCA* [2008] EWHC 2048 (Admin) per Thomas LJ at ¶173 and *A v Secretary of State for the Home Department (No.2)* [2006] 2 AC 221 per Lord Bingham at ¶41.

a presumption in favour of reception which the SSBT would need to displace: *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355 (at ¶150, per Lord Mance); *Law Debenture Trust v Ukraine* (at ¶204 per Lords Reed, Lloyd-Jones and Kitchin).

296. The SSBT relies on three "constitutional principles" to displace this presumption: ADGR ¶¶71-74) [CB/A/3/160-161]. That reliance is misplaced.

297. The SSBT's first objection is that reception of the customary rules would infringe the principle that Parliament alone can create criminal liability: ADGR ¶¶71-72 [CB/A/3/160]. This objection is without merit. None of the relevant customary rules give rise to criminal liability, whether on the part of a state actor or otherwise. The customary law obligations reflected in CA1 and the duty to prevent under Article I of the Genocide Convention have no direct analogue in international criminal law. Further and in any event, the Claimant does not suggest that the consequence of the reception of these norms into the common law is to create domestic criminal liability. Rather, the effect of reception is to condition the scope of the SSBT's public law powers, as set out above.

298. The SSBT's second objection is that common law reception would contravene the foreign act of state rule. That is wrong.

299. The position here is *a fortiori* that set out above in the context of Ground 8, because the Court is concerned not with the consequences of adjudicating on an alleged misdirection as to (or alleged breach of) a relevant norm in a particular case, but with (at most) the consequences of recognising the relevant norms as limits on public law decision-making. Reception of this kind would leave the courts entirely free to conclude that particular cases were non-justiciable due to the application of the foreign act of state rule, or to tailor or refuse relief in light of that rule. Furthermore, in many or even most cases the rule would simply not be engaged. For example:

299.1. Many cases would not invite — still less necessitate — an adjudication on the lawfulness of a foreign state's conduct. The focus would (necessarily) be on the UK's obligations, not those of another state. The error alleged may well be procedural in character (or, as in this case, involve a misdirection in law), and/or a finding of breach

on the UK's part may flow merely from a risk of such conduct,[489] obviating any need for definitive adjudication.

299.2. Even in cases where the court was asked to adjudicate substantively on breach of a foreign state's obligations, this may well be incidental to a ruling on the UK's own obligations (and not the *"very subject-matter of the action"*).

300. Again, if individual cases arose from time to time which were barred by the foreign act of state doctrine, the courts would remain free — and indeed bound — to decline to adjudicate them on that basis. In those circumstances, the reception of the relevant norms as constraining the power through the imposition of implied limits, or as delimiting the existence of a "good reason" for departing from policy or legitimate expectation is entirely consistent with the foreign act of state doctrine.

301. Further and in any event, even if the foreign act of state doctrine might otherwise apply to preclude reception, the norms relied upon by the Claimant would fall squarely within the public policy exception as articulated by the Supreme Court in *Belhaj*. As set out above, those norms are fundamental as a matter of international law and reflect basic principles of English public policy. They are akin to the customary international law and *jus cogens* prohibition on torture. In *R (Bow Street Magistrates, Ex P Pinochet (No.3)* [2001] 1 AC 147, Lord Millet described genocide and torture together as "*the most serious crimes against humanity*" (p.275C-D). Lord Hoffman observed to similar effect in *A v SSHD (No.2)* that "*[a]mong the many unlawful practices of state officials, torture and genocide are regarded with particular revulsion: crimes against international law which every state is obliged to punish whereby they may have been committed*": see ¶84.[490] The same is true of the basic rules of IHL. Rules of distinction and proportionality, together with rules concerning the protection of civilians and detainees, reflect elementary principles of morality which have long informed the development of the common law. Just as the doctrine of foreign act of state does not preclude the reception into the common law of the prohibition of torture (or unlawful detention or rendition), neither does it preclude the reception of obligations concerning genocide or the fundamental principles of IHL.

[489] As the Claimant contends is the case in respect of the obligation to prevent genocide.
[490] See further ¶ 33, and the passage of the judgment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Furundzija* (unreported) 10 December 1998, Case No IT-95-17/T 10 cited there.

302. Indeed, the effect of the reception of these norms into the common law is analogous to the effect of the reception into the common law of the prohibition on torture. Just as common law principles "*standing alone"* preclude the admissibility of evidence tainted by torture in the absence of express statutory authorisation *(A (No 2*) at ¶52), so too does the common law preclude decision-making by public authorities which is inconsistent with the fundamental norms in issue in this case. Far from authorising any derogation from these norms, Parliament has conferred on the SSBT powers which are designed to facilitate compliance with the UK's international obligations (*a fortiori* these particular norms)*:* see ¶97 above.

303. Torture is also relevant in the current context in a further respect. The Claimant has adduced extensive evidence relating to Israel's use of torture: see ASFG ¶74 [CB/A/2/541] *et seq*. It has also adduced evidence as to Israel's reliance on F-35s in the conduct of its military assault in Gaza: Andrews-Briscoe 2 [CB/D/27/568-580]. Israel's conduct of aerial warfare (using F-35s) is an essential ancillary to its practices in relation to the systematic mistreatment and torture of Palestinian prisoners, since detention operations in Gaza are generally preceded by campaigns of aerial bombardment.

304. In circumstances where the SSBT has (i) made an express finding that Israel is not committed to complying with international law, and (ii) identified possible breaches of IHL relating to the mistreatment of detainees (which incidents are, on the SSBT's own underlying evidence, properly characterised as torture, see ASFG ¶251) [CB/A/2/124], the continued supply of F-35 parts to Israel gives rise to (at least) a real risk of facilitating, sanctioning or otherwise rendering aid and assistance to torture.

305. The SSBT's third objection to the reception of these norms is that Parliament has already intervened through legislation to determine what aspects of international law relevant to the prevention of genocide and war crimes should form part of domestic law. However, the statutes upon which the SSBT relies (the Geneva Conventions Act 1957 and the International Criminal Court Act 2001) do not address the preventative duties relied upon by the Claimant in Grounds 8(A) and 8(C). Further and in any event, the authorities support the proposition that where Parliament has enacted legislation criminalising conduct to reflect a norm of customary international law, that does not preclude reception of related rules or norms: see e.g. *A (No. 2)*, where the fact that Parliament had criminalised torture by statute did not preclude recognition of a common law rule excluding evidence obtained via torture.

306. In addition to those three objections, the SSBT appears to suggest (at ADGR ¶¶75-78) that the customary norms relied upon by Claimant cannot be received into the common law because there is no relevant common law rule which they can shape. But there is an obvious common law rule that those norms are apt to shape: that of judicial review of executive action. Judicial review is of course "*a remedy invented by the judges to restrain the excess or abuse of power*" (*R v SSHD ex p. Brind* [1991] 1 AC 696, 751B (per Lord Templeman); it is "*a development of the common law, to ensure regularity in executive ... activity and so compliance with the rule of law*" (*R (Haralambous) v Crown Court at St Albans* [2018] AC 236 at ¶56, per Lord Mance). Moreover, judicial review is "*not at base about rights, even though abuses of power may ... invade private rights; it is about wrongs — that is to say misuses of public power": R v Somerset County Council ex p Dixon* [1998] Env LR 111, 121 (Sedley J, as he then was). Thus a claim brought on the basis of the received (or essentially reflected) customary norms in issue here would precisely be one "*brought on the basis of existing common law rules, even if it look[ed] to customary international law to guide the courts in the development or application of those common law rules*" (ADGR ¶76 [CB/A/3/162]).

307. More specifically, the customary norms in issue would *"guide the courts in the development or application of"* judicial review:

307.1. for illegality at common law (such that breach of the relevant customary norms, received by or reflected in analogous common law rules, constrain the exercise of state power; *cf.* the common law prohibition of torture *(A (No 2))* or the common law protection of freedom of speech (*Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 551); *R v SSHD ex p Simms* [2000] 2 AC 115));

307.2. for illegality as a matter of vires (such that the scope of the relevant statutory or prerogative power is conditioned by the relevant common law rule, cf. the principle of legality (*Simms*, at 131E-G (Lord Hoffman)); or see Donaldson LJ (as he then was) in *R v SSHD ex p Puttick* [1981] QB 767, 773 ("*statutory duties which are in terms absolute may nevertheless be subject to implied limitations based upon principles of public policy*"));

307.3. for rationality (as a matter of both process and outcome, such that the relevant customary norms, received by or reflected in analogous common law rules, limit the

range of reasonable responses open to the decision-maker: *cf.* *R v SSHD ex p McQuillan* [1995] 4 All ER 400, 422f-j (per Sedley J as he then was)); or

307.4. for want of good reason for departure from departing from policy (both as a matter of process, where the decision-maker must conduct a rational balance, and outcome, where the Court is the ultimate arbiter: *R (Nadarajah) v SSHD* [2005] EWCA Civ 1363 at ¶68 (per Laws LJ)).

308. There is thus no constitutional, statutory or common law reason to hold that the customary international law rules relied upon by the Claimant do not form part of the common law or are not essentially reflected in it. To the contrary, there are compelling reasons that they do. The statutory framework is designed to facilitate HMG's compliance with its international obligations (*a fortiori* the fundamental norms in issue here). If the rules are not received, then there is a risk that the UK would breach its international obligations (a point that tells in favour of reception: see Lord Reed, Lloyd-Jones and Kitchin in *Law Debenture Trust* at ¶205). Further, in the case of the prevention of genocide, the norm is of such fundamental importance — as in the case of torture — that the case for reception (or essential reflection) is uniquely powerful. Adapting Lord Cooke's words in *R v SSHD ex parte Daly* [2001] 2 AC 532 at ¶30, the customary norms in issue here are "*inherent and fundamental to democratic civilised society. Conventions ... respond by recognising rather than creating them"*: Lord Reed in *R (Osborn) v Parole Board* [2014] AC 1115 at ¶58.

309. Accordingly, the customary rules in question should be received by and are essentially reflected in common law. The F-35 Carve Out was premised on a material misdirection as to the status of the customary rules under domestic law and/or was inconsistent with one or more of those norms and was therefore unlawful.

VIII. GROUND 10: ULTRA VIRES BECAUSE OF RISK OF FACILITATING CRIME

310. The Claimant submits that the SSBT's exercise of his powers under Article 32 of the 2008 Order to enable the export of F-35 parts is *ultra vires* that Order and the 2002 Act pursuant to which it was made. This is because there is a significant risk that such exports will facilitate the commission of serious crimes.

A. FACILITATING CRIME AS ULTRA VIRES

311. The export of F-35 parts is being permitted in the face of a "clear risk" that those parts might be used to commit or facilitate serious violations of IHL. This in turn gives rise to a clear and significant risk that the policy may facilitate crimes contrary to the Geneva Conventions Act 1957 and the International Criminal Court Act 2001, which enshrine in domestic law the most serious violations of IHL.

312. Section 1 of The Geneva Conventions Act 1957 ("**GCA**") provides:

> (1) Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of [a grave breach of any of the scheduled conventions […] shall be guilty of an offence
> (1A) For the purposes of subsection (1) of this section— […]
>
> (iv) in the case of the convention set out in the Fourth Schedule to this Act, Article 147; and.

Article 147 of the Fourth Schedule to the GCA provides:

> "Grave breaches […] shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

313. In accordance with Section 51 of The International Criminal Court Act 2001, ('**ICCA**') it is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime. Section 51 applies to acts committed in England or Wales, and to acts committed outside of the UK by a UK national, resident or person subject to UK service jurisdiction. Section 52 creates an offence in respect of conduct ancillary to the commission of such crimes and applies to conduct inside the UK where it is ancillary to crimes committed outside of the UK, as well as to conduct committed outside of the UK by a UK national, resident or person subject to UK service jurisdiction.

314. Section 50 adopts the definitions of crimes set out in Articles 6, 7 and 8.2 of Rome Statute of the International Criminal Court ("**Rome Statute**") respectively. Crimes

against humanity encompass a range of acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, including murder, extermination, persecution and other inhumane acts.[491] War crimes include (i) intentionally directing attacks against civilians or the civilian population; (ii) intentionally directing attacks against civilian objects; (iii) launching disproportionate attacks; (iv) attacking objects attracting special protection; (v) pillaging; (vi) the transfer of all or parts of the population of occupied territory within or outside the territory; (vii) the use of starvation as a method of warfare; and (viii) destruction or appropriation of property without military necessity.[492]

315. Any conduct encouraging or assisting the commission of an offence under the ICCA or the GCA would constitute an offence under Section 44-46 of the Serious Crime Act 2007, regardless of where the conduct itself takes place.

316. It is a principle of statutory interpretation that Parliament is presumed not to require the performance of an ostensibly absolute statutory duty where to do so would facilitate the risk of serious crime, unless Parliament has made the contrary plain. The principle applies *a fortiori* to the exercise of statutory power. The 2002 Act, pursuant to which the 2008 Order was made and which confers the powers exercised by the SSBT, does not expressly sanction such a use of executive power. It follows that the F-35 Carve Out which facilitates the risk of commission of serious crimes is precluded by the 2002 Act.

317. This principle of statutory interpretation was established by the Court of Appeal in *R v Registrar General ex p Smith* [1991] 2 QB 393 (approving the submissions of the amicus, Mr John Laws as he then was). The Court held (applying an earlier case decided in a different context, *R v SSHD ex p Puttick* [1981] QB 767) that performance of an apparently absolute statutory duty should not be enforced, because there was a significant risk that to do so would facilitate crime resulting in danger to life and "*Parliament is presumed not to have intended that, unless it has said so in plain terms"* (at p.404C).

318. Staughton LJ observed that *"a principle that statutory duties, although apparently absolute, will not be enforced if performance of them would enable a person to commit*

[491] Rome Statute, Article 7(a)-(k).
[492] Rome Statute, Article 8(2)(b).

serious crime or even serious harm is fraught with difficulty" (as the SSBT notes at ADGR ¶98) [CB/A/3/168]), but concluded that (emphasis added):

> Nevertheless, I am persuaded that some such principle exists … it seems to me that Parliament must … be presumed not to have intended to promote serious crime in the future.

319. Contrary to the approach of the lower court, Staughton LJ held that the principle was not a matter of curial remedial discretion, but was rather "*a rule of law"* (at p.404D):

> …this is not the exercise of a discretion, either by officials with statutory duties to perform or by the court. It is in no way connected with the discretion of the court to refuse relief in judicial review cases. It is a rule of law to be applied in the interpretation of Acts of Parliament, on the facts of each case.

320. Staughton LJ emphasised that the principle is not limited:

> to cases where performance of the statutory duty is required for the purpose of a serious crime which the applicant intends to commit. It must be a matter of degree. The likelihood of future crime and the seriousness of the consequences if crime is committed must both be taken into account. For present purposes, it is sufficient to hold that a statutory duty is not to be enforced if there is a significant risk that to do so would facilitate crime resulting in danger to life.

321. As to the question of factual evaluation, Staughton LJ held as follows (at p.404E):

> It is a rule of law to be applied in the interpretation of Acts of Parliament, on the facts of each case. No doubt individuals with duties to perform will, when the topic arises, have to make their own assessment of the facts. But if their decision is challenged in court, the assessment of an individual will not be determinative, and it will be for a court to find the facts."

322. Sir Stephen Brown also accepted the submission that *"if the court would interpret a statute so as to prevent a grave crime being rewarded, a fortiori it should interpret statutes in a way which will prevent grave crimes from being committed"*: 401C-F.

323. The Defendant's reliance on *R (Hicks) v SSHD* [2005] EWHC 2818 (Admin) (at AGDR ¶100 [CB/A/3/169]) is misplaced. *Hicks* did not concern any question of whether executive power could be exercised to facilitate crime, but rather the Secretary of State's refusal to grant citizenship on the basis of the Claimant's past criminality. Collins J found on the facts of the case before him that there was no causal link between the applicant's past criminal behaviour and the grant of citizenship. As the SSBT himself

notes at AGDR ¶100 [CB/A/3/169], the applicant *"had not done anything wrong to establish the necessary conditions to be registered as a British citizen*."[493]

324. The SSBT also appears to seek to distinguish *Smith* on the basis that the principle of statutory interpretation in question applies to a statutory duty but not a statutory discretion: AGDR ¶99 [CB/A/3/168]. This is obviously wrong: the principle applies *a fortiori* to the exercise of discretionary power. The purpose of the principle is to promote public policy so that the performance of a statutory duty (*a fortiori* the exercise of executive power) does not lead to a risk of facilitating crime unless Parliament has made the contrary plain.

325. The SSBT asserts that the operation of the principle "*will depend on the interpretation of the legislation in question and the facts of the case":* ADGR ¶98 [CB/A/3/168]. The Claimant agrees. Critically, there is nothing in the legislation to show that Parliament made it "*plain"* that the SSBT's exercise of power extends to and encompasses the facilitation of the commission of serious crime. In the present case, there is no question that the criminal conduct identified is of the most serious nature, extending far beyond the danger to life identified in *Smith.* There is also a high likelihood of future crime, for the reasons set out further below.

326. The Defendant argues that several general principles, including the need to consider any adverse effect on global security, bear on the exercise of executive power in relation to licensing AGDR ¶102 [CB/A/3/169]. However, it is clear from the legislative scheme that such principles which include preventing threats to international law and human rights, are matters required to be considered under the legislative scheme as reasons **not to** grant a licence. The claimant repeats the matters set out at ¶97 above.

327. The Defendant is wrong therefore to suggest (AGDR ¶102 [CB/A/3/169]) that there is a tension between the purposes of the legislation and the relevant policy principle on which he relies. However, to the extent the Court holds that there is anything legitimately to be weighed against the public interest in preventing the facilitation of crime, the special nature of the crimes in issue here is decisive and the balance must be struck in favour of preventing crime. The conduct Parliament has criminalised reflects

[493] *R (CPS) v Registrar General* [2003] QB 1222 is also distinguishable. There the Court held that there is no principle of statutory interpretation that Parliament is presumed not to require the performance of an ostensibly absolute statutory duty where to do so would facilitate the **avoidance of liability for serious crime**. That is not the issue here.

rules of customary international law. These rules have been received into domestic law to prevent UK nationals from engaging in their commission. In this particular circumstance, the related customary international law norm imposed by CA1 can and should shape the application of the rule of public policy that statutory duties/powers should not be exercisable so as to facilitate crime thereby trumping any competing considerations.

B. THE NATURE OF THE COURT'S ASSESSMENT OF RISK

328. The SSBT asserts that in order to assess the significant risk of crime, "*the court must engage in the details of who it is that would allegedly be committing the offences, and how; the basis of their liability and the applicable actus reus and mens rea of the crimes":* ADGR ¶78 [CB/A/3/162]. Indeed, the SSBT appears to take the point further, claiming that the Court must assess the prospects of success of the prosecution of a specific person for a "threshold" of risk to be met: ADGR ¶90 [CB/A/3/166-167].

329. No authority is cited in support of that proposition. It is wrong, and runs contrary to the approach taken in *Smith.* There the appellant had argued that a pre-requisite for the operation of the principle should be that a person intended to commit the relevant crime, arguing that *"[a] rule so formulated would not apply in this case, for it cannot be said on the facts that the applicant was shown to intend any crime"* (at p.403A). This argument was expressly rejected by the Court of Appeal, which found that there was no requirement to show an intent to commit crime (at p.404C, 405B).

330. The question for the Court in the present case is a general one, which requires no gloss. In circumstances where the SSBT has accepted that there is a clear risk of Israel committing serious violations of IHL utilising components for F-35s, and in light of the factual background underpinning the SSBT's assessment, does allowing the export of F-35 components create a significant risk of facilitating serious criminal conduct?

C. THE SIGNIFICANT RISK OF FACILITATING CRIME

331. The starting point for the Court in assessing the risk of facilitating crime should be the likelihood of crimes contrary to the GCA or ICCA being committed using F-35s in Gaza. Firstly, because if there is a significant risk of such crime, that is sufficient for Ground 10 to succeed. Secondly, if there is a significant risk of such crime then it follows that there is a significant risk that conduct which assists in the provision of F-35 parts would itself be criminal, depending on the mindset of any given individual.

332. It is notable in this regard that the SSBT's analysis of the risk of criminal conduct focuses entirely on ancillary conduct and the intentions of those with potential accessorial liability in the UK: ADGR ¶¶90-93 [CB/A/3/166-167]. The SSBT provides no analysis to justify an assertion that there is no significant risk of F-35 parts being used to commit crimes in Gaza, simply highlighting the "*complexity*" of prosecution.

333. The Claimant submits that the evidence before the Court shows clearly that there is a significant risk of F-35 parts being used in the commission of crimes. Seven important features of the evidence in this regard are set out below.

334. **First**, it is common ground that there is a clear risk that any items exported to Israel for use in offensive military operations, including F-35 components, might be used to commit serious violations of IHL. The Defendant has accepted this risk with no calibration or caveat. As set out at above, serious violations of IHL are not synonymous with criminal conduct. However, there is no doubt that there is a large overlap between actions which would constitute a serious violation of IHL and actions which would constitute crimes.[494] There is no basis in the Defendant's evidence for drawing a distinction between risk in relation to serious violations which would not constitute crimes, and those which would. To the contrary, it is clear from the ECJU's own analysis that it considers that the risk encompasses criminal conduct (emphasis added): "*The ICC also concluded, on the evidence available to it, that there were reasonable grounds to believe Israel may have intentionally directed attacks against civilians in relation to two of the incidents referred by the prosecutor. Again, this corroborates our extant assessment that there is a clear risk items might be used to commit or facilitate a serious violation of IHL in the conduct of hostilities."*[495](emphasis added)

335. **Second**, the SSBT assesses that Israel is fully capable of complying with IHL, but is not committed to doing so, including in relation to the conduct of hostilities. This is

[494] This is clear from ¶2.11 of the "*The User's Guide to the European Code of Conduct on Exports of Military Equipment*" ('the User's Guide') which provides that "Serious violations of international humanitarian law include grave breaches of the four Geneva Conventions of 1949. Each Convention contains definitions of what constitutes grave breaches (Articles 50, 51, 130, 147 respectively). Articles 11 and 85 of Additional Protocol I of 1977 also include a broader range of acts to be regarded as grave breaches of that Protocol. For the list of these definitions, see Annex V. The Rome Statute of the International Criminal Court includes other serious violations of the laws and customs applicable in international and non- international armed conflict, which it defines as war crimes (Article 8 sub-sections b, c and e…)" Whilst The User's Guide is no longer applicable in this jurisdiction following the UK's departure from the EU, the SSBT accepts that its provisions continue to be relevant insofar as they offer guidance in respect of a materially identical set of export licensing criteria.

[495] Ministerial Submission from ECJU to SSFCDA 13 December 2024 ¶9 [SB/H/195/3069].

obviously material to the assessment of the likelihood of culpable, rather than mistaken, serious violations of IHL.

336. **Third,** much of the conduct in relation to detainees which led to the SSBT's conclusion that Israel is overall not committed to complying with IHL itself constituted conduct which was criminal in nature, contrary to GCA s.1.[496]

337. **Fourth,** as noted within the SSBT's own evidence, the assessment of the risk of facilitating crime takes place against the backdrop of a multiplicity of findings and concerns, expressed by UN expert bodies, the ICC, the UN CoI and numerous NGOs, that Israel has engaged in criminal conduct in Gaza. Of particular relevance in this context, the Chief Prosecutor of the ICC applied[497] for arrest warrants against the Israeli Prime Minister in relation to a number of war crimes and crimes against humanity (which warrants have since been issued by the Court). Whilst the SSBT did not have access to the Prosecutor's evidence base, it was noted that *"an independent panel of legal experts reviewed the… evidence and findings… concluding unanimously that the offences were 'systematic' and that there were reasonable grounds to believe the suspects had committed them".*[498]

338. **Fifth,** the particular nature of the use of F-35s, as set out in the Claimant's evidence and summarised at ¶46-54 above, adds to the significant risk that the carve out will facilitate crime. Almost every serious violation of IHL which could be carried out or facilitated using an F-35 will amount to a violation of international criminal law.

339. **Sixth,** as recognised within the SSBT's own assessments, the risk in relation to the use of exports in violation of IHL has been steadily escalating throughout the period of assessment, not diminishing.

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[496] By way of example, from a large volume of reports (i) On 29 April 2024 BCG Jerusalem received a report that the vast majority of Palestinian female detainees in Israeli prisons alleged that they had been physically assaulted, and in some cases sexually assaulted, including through rape (¶71 [CB/E/52/869]) (ii) On 2 May 2024, among the detainees returned by Israeli authorities via the Karem Abu Salem crossing was the dead body of 33 year old prisoner Ismail Abdelbari Khader. The Director of the Abu Youssef al-Najjar Hospital in Rafah assessed that the prisoner died inside the prison under torture. (¶69 [CB/E/52/868-869]) (iii) In mid-May 2024, FCDO officials received information that released detainees had made credible claims of disappearances, mistreatment, torture, and instances of sexual violence. They assessed the situation to be deliberate and instruction-based: in their opinion, the ministers in charge of detention had instructed staff to worsen the conditions in which people were held (¶74 [CB/E/52/869]).

[497] At the time of the Decision, arrest warrants had not yet been granted by the Pre-Trial Chamber

[498] Seventh IHLCAP Assessment, ¶78 [CB/E/41/710]

340. **Seventh**, the sheer scale of (i) the reported incidents of criminal conduct; (ii) the destruction of civilian infrastructure and infrastructure necessary for survival; (iii) civilian causalities; and (iv) attacks on deconflicted and humanitarian targets, and objects indispensable to the survival of the civilian population.

341. In relation to accessorial liability, it is clear that the *actus reus* of assistance can be fulfilled by the provision of components, as provided by the example of an arms supplier in *R v Jogee* [2017] AC 387 (at ¶9). For the reasons set out above, there is no need for the Court to assess individual *mens rea*; the significant risk of the commission of the crime in relation to its *actus reus* is sufficient.

342. The SSBT cites Archbold 2025 as support for the proposition that there can be no accessorial liability unless the primary offence is shown to have occurred. This is obviously correct if the question is whether somebody can be convicted, but it has no relevance in relation to the anterior question of whether there is a significant risk of the facilitation of crime.

D. JUSTICIABILITY

343. The Defendant contends that Ground 10 is non-justiciable, relying on *R (Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872. That contention is without merit.

344. **First**, it is based on a mischaracterisation of the Claimant's case. The SSBT contends that the Claimant is inviting the Court to sit in judgment on the acts of the Israeli state and UK ministers: ADGR ¶82 [CB/A/3/164]. That is wrong. The Claimant's case is that the significant risk of facilitating crimes is disclosed by the Defendant's own assessment of risk in relation to the export of military items to Israel. The Claimant is inviting the Court to determine the public law implications of the SSBT's own assessment.

345. **Second**, the analysis of justiciability in *Noor Khan* relied on the foreign act of state doctrine as set out in *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855. That line of authority was discussed in *Belhaj v Straw*. For the reasons set out above in relation to Ground 8, the SSBT's reliance on this doctrine is equally misplaced in respect of Ground 10. Further, in relation to Ground 10, the criminal provisions of the GCA and the ICCA would lose all meaning if Courts in England and Wales were unable

to make decisions which touched on criminal liability where the acts of another State were involved.

346. **Third**, the present case is on all fours with the position considered by the Supreme Court in *Rahmatullah*. In that case, the Secretary of State argued that the Court was prohibited from considering the legality of the claimant's detention and issuing a writ of habeas corpus because this would involve sitting in judgment on the acts of the US. The Supreme Court disagreed (at ¶53) (emphasis added):

> The illegality in this case centres on the UK's obligations under the Geneva Conventions. It does not require the court to examine whether the US is in breach of its international obligations… Here, there was evidence available to the UK that Mr Rahmatullah's detention was in apparent violation of GC4. The illegality rests not on whether the US was in breach of GC4 but on the proposition that, conscious of those apparent violations, the UK was bound to take the steps required by article 45 of GC4.

347. By the same token, the SSBT's own assessment in this case indicates that the continued export of F-35 components creates a significant risk of facilitating the most serious kind of domestic criminal offence. The illegality rests on whether, conscious of this risk, the SSBT has the power nevertheless to exercise his powers to enable such exports.

348. **Fourth**, and in any event, even if the doctrine of foreign act of state might otherwise apply, the conduct in issue in the present case falls squarely within the public policy exception for the reasons set out above.

IX. GROUND 11: IRRATIONAL ASSESSMENT OF RISKS OF SUSPENSION

349. The evidence available in OPEN indicates that the SSBT's decision not to suspend F-35 parts was based on three assertions or considerations:

349.1. **First**, the SSBT proceeded on the basis that it would not be possible to suspend F-35 parts for items sent to Israel without suspending parts for all F-35 recipients, because the UK does not track where the parts go after providing them to the global pool: "*UK suppliers provide their parts and components to the GSS when demanded by the Prime Contractors without knowledge and indication of where the part is destined. The immediate impact of a suspension of export licensing would therefore*

be on sustainment of the F-35 global in-service fleet resulting from interruption in supplies to the GSS."[499]

349.2. **Secondly**, the SSBT considered a unilateral suspension of items for use by Israel to be impossible because the nature of the F-35 supply scheme means that parts to one country cannot be suspended except on a consensus basis. The ADGR explains that this is because a Memorandum of Understanding not disclosed in OPEN, in place between the States which participate in the F-35 programme (the "**MOU**" and "**Participating States**" respectively) provides for an Executive Steering Board (the "**JESB**") which makes consensus decisions about the F-35 programme (ADGR ¶110 [CB/A/3/172]); and that any limitation on the use of components in F-35s for Israel would require a consensus decision of the JESB (ADGR/ ¶112 [CB/A/3/172]).

349.3. **Thirdly**, although this consideration is not mentioned in the ADGR, the SSBT appears on the decision-making documents to have been concerned about the "*potential impact on UK/US relationship of any suspension of export licences to the F35 programme*".[500]

350. As to the first concern, the fact that UK exporters cannot know the destination of any particular part at the point of export is irrelevant. What matters for the purpose of the suspension decision is whether the contractors who operate the 'spares pool' and distribute parts to particular programme-users know: (i) which state the part is being assigned to, (ii) which state produced it, and (iii) that they are instructed by the UK not to transfer parts produced in the UK to Israel. That is all that is required in order for the 'supply pool' operators to ensure that any suspension decision impacting F-35 parts effectively prevents the indirect export of UK manufactured parts to Israel.

351. Further, the supply pool operators must know which state they are exporting to, because that is necessary in order for the system to work (i.e. for distributions to be effectively made); and they must equally know who produced the relevant parts in circumstances where (i) there must be some means of identifying the origin of faulty parts in order to remedy such issues, and (ii) UK manufacturers are sole suppliers of particular items (as is the case for ejector seats, for example Detailed Advice from the Defence Secretary to the Defendant and SSFCDA [CB/E/30/588]). Neither the ADGR nor the SSBT's

[499] **Exhibit KB1** [CB/E/59/921-925]
[500] **Exhibit KB1** [CB/E/59/925-926]

evidence in OPEN contain anything to gainsay these obvious and basic points. It is said only that "*further work would be needed to put in place the necessary logistics for separating out components destined for Israel*": ADGR ¶113 [CB/A/3/172]. This impliedly concedes that such logistical modifications are achievable. To the extent that there is evidence in CLOSED of efforts made to resolve any logistical issues, the Court is invited to consider the submissions of the Special Advocates on those matters.

352. Moreover, as explained at ¶43 above, UK-manufactured F-35 components are not exclusively exported to the global 'spares pool': they are also exported directly to assembly lines, where they comprise 15% of the value of each new aircraft. The advice received by the SSBT was that *"[o]n the assembly line the end user is identified for the completed aircraft, which means the impact of export controls can be more easily monitored*".[501] It follows that the SSBT's first concern can only possibly have applied to a subset of F-35 components, and on no view provided a rational basis for failing to suspend parts for new aircraft. That is *a fortiori* in circumstances where the same advice stated that the "*next production aircraft deliveries are expected towards the end of 2024*",[502] such that new parts were likely to be incorporated into aircraft exported to Israel.

353. As to the second concern, the documents available in OPEN do not evidence any detailed discussion of modifications to the programme necessary to restrict supply: on the contrary, only "*informal discussions*" have been commenced: Bethell 1 ¶14 [CB/D/26/563]. It would be surprising if the MOU has the effect alleged and/or is wholly incapable of amendment. No evidence of engagement with Participating States has been adduced in OPEN, despite requests in correspondence from the Claimant for information about such engagement. To the extent that such evidence is available in CLOSED, the Court is invited to have regard to it.

354. Moreover, if that were so, the Government would have bound itself to an unamendable MOU that was incompatible with its domestic licencing regime, and with its international obligations. To the extent the Defendant suggests that the UK's obligations under the MOU take precedence over its other international obligations that would prohibit the transfer, that is wrong. In respect of obligations under the ATT, for example,

[501] Letter from Defence Secretary with detailed advice (Exhibit KB1**)** [CB/E/59/922].
[502] Ibid.

the effect of Article 26(1) means that ATT obligations prevail over other inconsistent obligations.[503] Similarly, the MOU also cannot override such fundamentally important and universally applicable rules contained in Article I of the Genocide Convention and CA1 without direct words to that effect.[504]

355. As to the third concern, *viz* the SSBT's asserted concerns about an impact on UK-US relations, no evidence at all has been adduced in OPEN (issues relating to UK-US relations having been entirely redacted). In any event, there is no rational basis to conclude (i) that UK-US relations are more important to international peace and security than the UK's compliance with its own legal obligations (both domestic and international), including its commitment to fundamental principles of IHL and IHRL; (ii) that the UK's compliance with its own legal obligations could or should fundamentally undermine its relations with the US, such that they should be abandoned; or (iii) that the UK should jettison its compliance with its own legal obligations for fear of incurring the displeasure of another state.

356. Indeed, the Dutch Court of Appeal in its judgment of 12 February 2024 in *Oxfam (and others) v the Netherlands* dismissed a materially identical concern raised by the Dutch Government. In that case, the Dutch Government had submitted that *"stopping the supply of F-35 parts to Israel would cause serious damage to the good relations of the Netherlands with Israel and the United States and would also damage the confidence of other allies participating in the F-35 project"* (¶3.15). The Dutch Court of Appeal recognised "*the interest that the State has in ensuring that the Netherlands fulfils its international obligations towards the US, an important ally*", but concluded that the "*interest in compliance with the international obligations of the State under international instruments relating to the regulation of the arms trade*" and under the Geneva Conventions (including CA1) *"carries more weight*" (¶5.47). The Court further noted that the Dutch Government had failed to "*sufficiently substantiate*" its assertion that by complying with its international obligations, it would undermine "*the reliability*

[503] Kobecki and Pittmann, "Article 26" in Da Silva and Wood (eds), *The Arms Trade Treaty: Weapons and International Law* (2021), 411.

[504] *ELSI*, Judgment, I.C.J. Reports 1989, ¶ 50: "*the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so*." Nor could the Defendant argue that the MOU could be used to 'read down' obligations in the ATT (similar to the argument it makes in respect of CA1) because: (i) of the operation of Article 26(1) of the ATT, referred to above; (ii) the MOU is not a subsequent agreement between all the parties to the ATT as to its interpretation (Art 31(3)(a) VCLT); (iii) nor is the MOU an instrument containing 'relevant' rules of international law applicable between all the parties to the ATT (Art 31(3)(c) VCLT).

and security of the Netherlands and other countries" (¶5.51). Had the Defendant rationally assessed the position, he would have reached the same conclusion.

X. GROUND 12: ERROR IN THE ASSESSMENT OF WHETHER THERE WAS A "GOOD REASON" FOR DEPARTING FROM CRITERION 2(C)

A. OVERVIEW

357. Ground 12 is concerned with "*process*" rationality, of the kind discussed by Chamberlain J in *R (KP) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] EWHC 370 (Admin) at ¶¶55-56.

358. In determining whether there was a *"good reason"* to depart from Criterion 2(c), the SSBT weighed the risks of the continued export of F-35 parts against the risks of suspending these exports. In respect of the former, he took account of the *"clear risk"* of a *"serious"* violation of IHL but did not seek to assess the nature, extent and gravity of this risk. The Claimant's case is that this was not a rational approach, particularly in circumstances where the SSBT did account for the nature, extent and gravity of the risks of suspension.

359. Further or in the alternative, the matters identified in Grounds 8, 10 and/or 11 gave rise to material errors in the SSBT's approach to the balancing exercise.

B. THE FACTUAL CONTEXT

360. The essential factual context underpinning Ground 12 is not in dispute.

361. The SSBT concluded that continued export of F-35 parts would breach Criterion 2(c), i.e. that there was a *"clear risk that the items might be used to commit or facilitate a serious violation of international humanitarian law"*. As a result, continued export would be in breach of the SSBT's published policy, from which he was entitled (as a matter of public law) to depart only if there was a *"good reason"* for doing so.

362. In deciding whether there was a *"good reason"* to depart from Criterion 2(c), the SSBT conducted a balancing exercise, weighing the risks of continuing to export F-35 parts

against the risks of suspending those exports. This exercise is described at ADGR ¶¶122-127 [CB/A/3/173-177],[505] and reflected in the contemporaneous documents.[506]

363. On the former side of the scales (the **"risks of export"**), the SSBT placed the *"clear risk that Israel might commit"* one or more serious violations of IHL — that is, the threshold assessment which gave rise to the need for the balancing exercise in the first place: ADGR ¶¶7(g), 124, 126 [CB/A/3/137,175,176]. He made no attempt to assess and take account of the extent, nature (including the proper legal characterisation), or potential gravity of those risks.[507] Nor did he attempt to identify, much less assess, the broader risks of export — including (for example) the risk of serious violations of IHRL; and/or the risk of exposing UK officials to liability for serious violations of international law.

364. On the latter side of the scales (the **"risks of suspension"**), the SSBT placed what he assessed to be the *"immensely serious and imminent risks to international peace and security"* ADGR ¶130 [CB/A/3/177] arising from disruption to the F-35 programme. In his ADGR, the SSBT indicated for the first time that he does not contend, and did not proceed on the basis, that these risks would necessarily have overridden any risks of export: ADGR ¶121 [CB/A/3/174-175].[508]

365. On this basis the SSBT determined that the risks of suspension outweighed the risks of export, and hence that there was a *"good reason"* to depart from Criterion 2(c).

366. In deciding whether to depart from Criterion 2(c), weighing the risks of export against the risks of suspension was (in public law terms) the appropriate approach. *Nadarajah* and numerous subsequent authorities[509] establish that the existence of a *"good reason"*

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[505] Explaining that the Defendant *"identified and balanced"* (on the one hand) *"the risks inherent in not suspending F-35 licences"* and (on the other) *"the risks inherent in suspending F-35 licences"* [CB/A/3/173-177].

[506] See e.g. submission of 30 August 2024, ¶2(a) (*"you are then asked… in relation to the F-35 programme, to consider the balance between the impacts raised by the Defence Secretary and the consequences of continuing to supply the F-35 programme and decide whether licences permitting export of components to the F-35 programme should be excluded from your decision on suspension"*) (emphasis added).

[507] The Defendant's defence is not that he did in fact attempt to calibrate the risks of export, but that he was not required to do so: see e.g. ADGR 7(d) and (g) [CB/A/3/137], 126 [CB/A/3/176], 129-130 [CB/A/3/177].

[508] As explained at fn 113 of the Claimant's Reply [CB/A/4/226], this submission is inconsistent with the Defendant's position at the time of the "linkage" judgment – which was that the risks of suspension were so significant that they were bound to be overriding, meaning that the Defendant's failure to calibrate was rational precisely because calibration was incapable of altering the overall outcome of the balancing exercise: see [2025] EWHC 173 (Admin), ¶16-17, 30-31, 44-45. The consequences for the Defendant's argument under s.31(2A) of the Senior Courts Act are considered at ¶¶380-383 below. Notably, these consequences follow even if (as the Defendant appears to insist) there is no direct inconsistency.

[509] See e.g. *Paponette v Attorney-General of Trinidad and Tobago* [2012] 1 AC 1, ¶37-38 (onus on the public authority to justify the frustration of a legitimate expectation by reference to an *"overriding interest"* against which *"the*

for departing from a published policy (or legitimate expectation) turns on an assessment of proportionality, which involves balancing the public interest pursued against competing interests and considerations.[510] This is the exercise the SSBT set out to undertake. The overarching question under Ground 12 is whether he did so lawfully.

C. THE PRIMARY CASE FOR "PROCESS" IRRATIONALITY

367. The Claimant contends that the SSBT's approach to the balancing exercise was irrational. Its primary case is as follows.

368. As noted above, in respect of the risks of export the SSBT relied solely on his prior conclusion that *"the 'clear risk' threshold had been crossed"*: ADGR ¶7(d) [CB/A/3/137]. His analysis ended there. In particular, he made no attempt (i) to assess or take account of the extent, nature, and gravity of the risk of serious IHL violations by Israel (the exercise referred to as "*calibration*"), or (ii) to identify, much less calibrate, other potential risks of export. This was irrational because, put simply, one cannot conduct a balancing exercise without even attempting to work out what sits on one side of the scales.

369. As to the failure to calibrate the risk of the commission or facilitation of serious IHL violations by Israel, the category of *"clear risk of a serious violation"* is a wide one. Within this category, different risks are — depending on their nature, extent and gravity — likely to be afforded different weight in the balancing exercise, to the point where (as the SSBT now accepts) some risks would be capable of tipping the overall balance.

370. By failing to undertake a calibration exercise, the SSBT disabled himself from gaining <u>any</u> further insight into the risks he was seeking to weigh. By way of illustration, the SSBT had no means of differentiating between (on the one hand) a clear but limited risk of the exported items being used to commit or facilitate an isolated violation of international law, affecting a limited number of people; and (on the other) a clear likelihood of the items being used to commit or facilitate widespread war crimes and

requirements of fairness" must be weighed); <u>*Alliance of Turkish Businesspeople v SSHD*</u> [2020] 1 WLR 2436 at ¶19, 66 (approach is to ask whether *"frustrating the substantive expectation can be objectively justified as a proportionate response, having regard to the legitimate aim pursued"*).

[510] There is, of course, a further question as to the method or standard of review a court should adopt when reviewing the balance struck by the decision-maker (see ¶92 and fn 119 of the Claimant's Reply [CB/A/4/229]) – but, given the focus of Ground 12, it is unlikely to require resolution in this case.

crimes against humanity, or indeed acts of genocide, affecting the entire Palestinian population of Gaza.

371. No reasonable decision-maker tasked with the balancing exercise would deprive themselves of the ability to draw these kinds of important and potentially critical distinctions. Put another way, any reasonable SSBT would at least have attempted the calibration exercise.

372. This is particularly so in circumstances where the SSBT did calibrate the countervailing risks of suspension. In particular he identified the specific nature of the relevant risks to peace and security; the extent of these risks (i.e. the likelihood of their materialising); and the gravity of the consequences if they did.[511]

373. The SSBT's failure to calibrate was accordingly irrational. This error was compounded by his failure to seek to identify and calibrate other potential risks of export, beyond the risks of serious violations of IHL. As noted above, these would likely have included the risk of serious violations of IHRL[512] and/or the risk of exposing UK officials to liability for serious violations of international law.[513] As the balancing exercise was (properly) intended to take account of the full range of risks arising from continued export,[514] these risks could not reasonably be excluded from consideration.

374. The SSBT has failed to offer any coherent explanation of how a rational decision-maker could decline to seek to calibrate and fully identify the risks he proposed to weigh, where this was capable of making a difference to the outcome. Still less has he explained how

[511] For example: (i) The first identified risk involved disruption to the F-35 programme undermining the credibility of NATO's warfighting plans ADGR ¶127(a) and (f) [CB/A/3/176]. This was assessed as likely to materialise swiftly ("*within weeks*" or "*immediately*"). The consequences if it did were expressly identified as "*very serious*". (ii) The second identified risk was needing to pause planned F-35 transfers to Ukraine ADGR ¶ 127(g) [CB/A/3/176-177]. This was considered to arise only in the event of a "*prolonged disruption*" and, even in that scenario, to be less than likely ("*might require NATO states… to pause*"). (iii) The third identified risk involved a drastic reduction in NATO's ability to gain control of the air ADGR ¶127(e) [CB/A/3/176]. This was considered to arise only in the event of a conflict, but to be likely in that scenario ("would drastically reduce"). The consequences were identified as the risk of "*a protracted, attritional land campaign with much higher casualty rates*".

[512] Including for example the rights to life and food: see fn 380 above.

[513] As to which see VIII.C above (in the context of Ground 10). Even if these risks were not such as to render the Defendant's decision *ultra vires*, they were obviously relevant to and fell to be accounted for in the balancing exercise.

[514] This is clear from the broad terms of both the contemporaneous documents and the description of the balancing exercise contained in the ADGR: see ¶362 above. While the risk of serious IHL violations by Israel was plainly front and centre, there is no indication that the Defendant sought formally to limit himself to risks of this kind when assessing the risk of export; indeed, in the Claimant's submission he could not lawfully have done so. This is particularly obvious with respect to international peace and security, which cannot rationally have been treated as relevant to one side of the scales and not to the other.

he could reasonably decline to do so in circumstances where he did calibrate the risks on the other side of the scales.

375. In reality, the SSBT's only response to Ground 12 appears to be that it was rational not to attempt the calibration exercise because it would not have made a difference on the facts. This is, of course, circular. The focus is (and must be) on the reasoning process adopted at the time. Without having made any attempt to calibrate risk — even in summary form — the SSBT cannot have had any basis for concluding that the calibration exercise would make no difference to the outcome, and hence cannot reasonably have declined to undertake it on that basis. Ultimately, the SSBT's argument avails him only if and to the extent that it founds a refusal of relief (the irrationality of his approach notwithstanding) under s.31(2A), as to which see subsection E below.

D. THE STANDARD OF REVIEW

376. There is (and can be) no dispute that the Claimant's primary complaint under Ground 12 is justiciable. It turns on well-established principles of domestic public law, and does not come close to requiring judicial adjudication on the lawfulness of action by Israel. The only question is the appropriate standard of review.

377. It is significant in this regard that the Claimant's case turns on process rather than outcome. As such, it is on no view the *"epitome"* of a case for deference to the decision-maker: *cf.* ADGR ¶128 [CB/A/3/177]. To the contrary: where a decision-maker has undertaken to weigh one set of risks against another, the Court is perfectly well placed — in terms of both constitutional responsibility and institutional expertise — to determine whether it was rational to seek to calibrate the risks on one side of the scales and not the other.

378. The significance of what is at stake in this case also favours the more intense standard of review referred to as *"anxious scrutiny"*: see e.g. *KP*, ¶58-63, 76.[515] As explained in detail above, these stakes could hardly be higher in both legal and human terms. The export of F-35 parts continues to contribute to the devastation in Gaza: it will be recalled that F-35s are described as *"the most lethal fighter jet in the world"* and are being used regularly by the Israeli military in Gaza, including in cases described by the UN Office

[515] As this standard flows from the gravity of the consequences of the decision, it is equally applicable where (as here) a claim is brought for the benefit of, rather than directly by, the individual(s) whose rights or interests are affected: see e.g. *R (Hillingdon LBC) v Lord Chancellor* [2009] 1 FCR 39, ¶67; *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin), ¶240.

of the High Commissioner for Human Rights as *"emblematic"* of indiscriminate and disproportionate attacks against the civilian population.[516] Further, the claim raises serious questions as to the UK's understanding of and compliance with some of its most fundamental international legal obligations. Accordingly, *"the court will subject the decision to 'more rigorous examination, to ensure that it is in no way flawed'"*: *ibid*, ¶77, 80.

379. On this approach — and indeed even on a more deferential standard of review — the SSBT's approach was irrational for the reasons set out in subsection C above.

E. THE "MAKES NO DIFFERENCE" ARGUMENT

380. As explained above, the SSBT's only real defence to Ground 12 is his invocation of s.31(2A)[517] of the Senior Courts Act, which provides that the Court *"must refuse to grant relief on an application for judicial review… if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred".* The key principles are summarised above.

381. Applying those principles in relation to Ground 12, the question for the Court is whether the Defendant can establish that, even if he had engaged in a lawful calibration exercise — that is, in a counter-factual scenario in which he lawfully assessed the nature, extent and gravity of the risk of serious IHL violations by Israel — and even if he had lawfully identified and calibrated all other relevant risks, it is *"highly likely"* that he would have concluded that the risks of export were outweighed by the risks of suspension.

382. The SSBT has not come close to discharging this burden[518]:

382.1. The SSBT accepts, and the Court's assessment of the counter-factual must proceed on the basis, that the risks of suspension were not necessarily overriding — such that the risks of export, properly calibrated, could in principle outweigh them.

382.2. The SSBT has chosen to offer no evidence (and indeed no submissions) as to the nature, extent, or gravity of the risks of export which would have tipped the balance.

[516] See ASFG, ¶86-87 [CB/A/2/57].
[517] And s.31(3C).
[518] Just as he has not done in relation to Ground 8, as explained above.

382.3. Nor has the SSBT offered any evidence as to the nature, extent or gravity of the risks which he says a lawful calibration exercise would have identified on the evidence available at the time of the September Decision. Indeed, he has not even offered witness evidence seeking to confirm the bare assertion that a lawful calibration exercise would have made no difference to the outcome of the balancing exercise.

382.4. Little if any assistance can be derived from the contemporaneous documents underpinning the *"clear risk"* assessment, as these applied a methodology which cannot fairly and properly be taken as lawful.[519]

383. In light of the above, all that the Court can confidently conclude about the counterfactual scenario is that the SSBT would have been faced with a wealth of evidence establishing (at the very least) a clear risk of serious violations of IHL; and that the lawful calibration of this risk would in principle have been capable of changing the result of balancing exercise. Beyond this, and without hearing argument on and determining what a lawful calibration exercise would have involved, the Court cannot reach safe conclusions as to what such an exercise would have yielded as to the nature, extent and gravity of the relevant risks; and cannot safely conclude that these conclusions would not have tipped the overall balance. All of this would enter into the realm of speculation, against which the authorities on s.31(2A) so consistently warn.

384. Accordingly, the SSBT has identified no proper basis on which the Court could conclude that it is *"highly likely"* that the outcome of the balancing exercise would have been the same even if the errors identified in Ground 12 had not been committed.

F. INTERACTION WITH OTHER GROUNDS OF REVIEW

385. The Claimant's primary case on Ground 12 is independent of the Court's conclusions on any of the Claimant's other grounds of challenge.

[519] The Claimant maintains that it was not, and that the use of a lawful methodology would have led to the identification of a high level of risk of extremely grave breaches of IHL, including genocide. However, the Claimant accepts that the Court may conclude that the 'linkage' judgment precludes it from advancing this case on the basis that any methodological errors would be irrelevant to the outcome on Grounds 8-12. That being so, and as explained at fn 113 of the Claimant's Reply, the lawfulness of the SSBT's methodology cannot now be assumed against the Claimant so as to deny it relief (under Ground 12 or otherwise). If it were necessary to seek to determine what a lawful calibration exercise would have yielded – which in the Claimant's submission it is not — the appropriate approach would be to take the Claimant's case on Grounds 2-7 at their highest, or to permit the parties to make full arguments on the issue at the point of determining remedy.

386. However, if the Claimant succeeds on any of Grounds 8, 9, 10 or 11, this gives rise to a further (or alternative) material error of law in the context of Ground 12. Specifically:

386.1. If the Claimant is correct (in respect of Ground 8) that the Defendant misdirected himself as to the nature of the UK's relevant international obligations, that was also a material error in the context of Ground 12 — as it follows that the balancing exercise proceeded on the basis of an unlawful conclusion regarding the UK's compliance with those obligations. A lawful assessment on this point was obviously centrally relevant to the risks of export side of the scales — indeed, it is precisely the kind of factor which might have been capable of tipping the overall balance.

386.2. If the Claimant is correct (in respect of Ground 10) that continued export gave rise to a significant risk of facilitating crime, that also suggests a material error in the context of Ground 12 — as it follows that the balancing exercise failed to account for that risk, which (again) was obviously relevant to the risks of export.

386.3. If the Claimant is correct (in respect of Ground 11) that the Defendant erred in his assessment of the risks of suspension,[520] that was also a material error in the context of Ground 12, since a lawful appraisal of these risks was central to the balancing exercise.

386.4. Finally, and for the avoidance of doubt, if the Claimant is correct (in respect of Ground 9) that one or more of the norms of customary international law relied upon forms part of the common law, it follows that the SSBT was not (and would not in future be) entitled to conduct the kind of balancing exercise on which the F-35 Carve Out and Ground 12 are predicated. If a lawful assessment of compliance with those norms[521] showed that one or more of them would be breached by continued export, such export would be unlawful.

G. CONCLUSION

387. For all the reasons above, the SSBT's approach to the balancing exercise was unlawful. The appropriate outcome is for him to be required to undertake the risk assessment and calibration exercise and to re-take his decision accordingly.

[520] Fn 116 of the Claimant's Reply mistakenly referred to the *"risks of export"* rather than the *"risks of suspension"* in this context [CB/A/4/227-228].
[521] Made having regard to the resolution of the interpretive issues raised by Ground 8.

XI. GROUND 13: UNLAWFUL DECISION-MAKING IN RELATION TO UNSUSPENDED LICENCES

388. The submission to the Defendant on 30 August 2024 asked him to decide whether (i) to follow the SSFCDA's recommendation to suspend extant licences for equipment assessed to be for use in military attacks in Gaza only; or (ii) "*go beyond"* what the SSBT considered was required by a *"strict application*" of the SELC and "*send a political signal*" by suspending all extant licences for use by the Israeli army regardless of their potential use [CB/E/56/896]. Ground 13 relates to the Defendant's failure to have regard to matters which were mandatory relevant considerations when making that decision. In particular:

388.1. The SSBT chose option (i). He thereby decided not to suspend any licences for any items except those which he assessed to be for use in military attacks Gaza. That was despite the fact it was open to the SSBT to include within the scope of the suspension any arms or materials exported to Israel that could be used to facilitate Israel's unlawful presence in the West Bank, including East Jerusalem, and Gaza (as distinct from material used specifically in the conflict).[522]

388.2. When deciding not to suspend such items, the SSBT had no regard at all to the ways in which the unsuspended items might be used by Israel, for example in the West Bank, including East Jerusalem. The SSBT appears to have adopted an approach of ignoring Israel's conduct in the West Bank (in particular) on the basis that the SELC only 'required' suspension of items for military use in Gaza. Indeed, in contrast with his decision on items assessed to be for military use in Gaza — in relation to which he considered assessments of SELC compliance (albeit assessments which were partial and erroneous) — the SSBT's decision on which option to adopt was taken on the sole basis of whether this would be an appropriate way to "*send a political signal*".[523] Put differently, there is nothing in OPEN to suggest that any factors other than political signalling were factored into the decision. This is a matter which will of course require further consideration by reference to the evidence in CLOSED.

388.3. However, the SELC expressly apply to "*all licence decisions*", and so *must* also be applied to items capable of being used in the West Bank, including East Jerusalem;

[522] See, for example, submarines, maritime patrol equipment and *"security scanners for crossing point authority"* in the 'amber' list of licences: Annex C to the Submission from ECJU to the Foreign Secretary of 24 July 2024.
[523] ECJU Submission to the SSFCDA (Exhibit RP2-1) [CB/E/31/594].

and in any event the potential uses in the West Bank of items being exported are considerations which are so obviously material to the decision that any rational decision-maker would have regard to them.[524]

388.4. It follows that the SSBT erred in failing to have regard to mandatory relevant considerations, specifically those set out below. It appears that this error stemmed from his misdirection that the decision between option (i) and option (ii) was wholly one of political signalling, and therefore did not require consideration of the SELC.

389. The matters to which the SSBT unlawfully failed to have regard were, in particular, (i) Israel's history of undisputed breaches of international law outside of Gaza; and (ii) the consequential risk that the items might be used to maintain Israel's illegal presence in the oPT and/or facilitate other unlawful acts by Israel. Notably:

389.1. On 19 July 2024, the ICJ had issued the oPT Second Advisory Opinion in which it confirmed that Israel's occupation of and continued presence in the oPT was illegal, in serious violation of international law and constituted a serious breach of the fundamental right of the Palestinian people to self-determination.[525] Despite that, when deciding to adopt option (i) the SSBT failed to have regard to the possibility that Israel would use unsuspended items in support of "*its settlement policy, its acts of annexation, and its related discriminatory measures*" which "*are in breach of international law*" (oPT Second Advisory Opinion ¶230), and its prolonged and ongoing unlawful presence in the West Bank in an egregious violation of the fundamental right of the Palestinian people to self-determination (*ibid*, ¶243 and ¶¶261-262). The SSBT has never substantively addressed this issue, despite correspondence from the Claimant.[526]

389.2. The unlawful occupation of the West Bank has deepened and worsened significantly since October 2023. By way of example only: (i) mass forced displacements are occurring, with some 40,000 Palestinian refugees being forcibly displaced in the

[524] Indeed, the relevance of the SELC to <u>new</u> licence decisions has been duly recognised by the Defendant: see Hurndall 2, §5 [SB/B/14/113-114] and Pratt 1, §§82-101 [SB/B/13/107-111].
[525] *oPT Second Advisory Opinion*, §§261-264,
[526] See letter from the Claimant dated 12 March 2025, §3 **[SB/A/9/60-61]**, letter from the Defendant dated 18 March 2025, §4 **[SB/A/10/63]**, and ADGR §135(b) **[CB/A/3/178]**, stating only that "*[t]he consequences of the ICJ's Advisory Opinion on the Occupied Palestinian Territories are being considered in detail across relevant Government departments*", without any assertion that these were taken into account by the Defendant at the time of the decision.

northern West Bank just between 21 January and 10 February 2025;[527] (ii) demolitions in the West Bank have increased dramatically, for example doubling in East Jerusalem in the first quarter of 2023 compared to 2022;[528] and (iii) Israeli settlements in the West Bank, including East Jerusalem, have been significantly consolidated and expanded.[529]

389.3. The IHLCAP Assessment dated 21 March 2024 recorded at ¶70 that *"[t]he UK's annual Human Rights and Democracy Report states that Israel's systematic policy of illegal settlement expansion in the OPTs is a breach of IHL. This position is supported by the UN Security Council and other international observers. This reflects negatively on Israel's commitment to its IHL obligations, and should be taken into account when assessing Israel's overall commitment to IHL"* (Exhibit CH2-34) [SB/E/74/944-945]. The SSBT had therefore (i) concluded that Israel was not committed to IHL, and (ii) had before him an assessment which supported a finding that this lack of commitment was not confined to Israel's military assault on Gaza. Despite that, he failed to have regard even to the possibility of unsuspended items being used to commit or facilitate a breach of international law in the West Bank, including East Jerusalem.

389.4. A necessary corollary of the SSFCDA's determination that Israel was not committed to complying with IHL in its conduct of the assault on Gaza was that its repeated bilateral assurances to the contrary had been false or unreliable. It follows that Israel had, deliberately or otherwise, provided false or misleading bilateral assurances to HMG on a number of occasions.[530] The implications of that finding for any reliance to be placed on assurances about the use of unsuspended items in the West Bank (including East Jerusalem) was not considered.

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[527] UNRWA, "Large-scale forced displacement in the West Bank impacts 40,000 people", 10 February 2025, available at https://www.unrwa.org/newsroom/official-statements/large-scale-forced-displacement-west-bank-impacts-40000-people.

[528] Office of the European Union Representative (West Bank and Gaza Strip, UNRWA), 19 November 2024, available at https://www.eeas.europa.eu/sites/default/files/documents/2024/One%20Year%20Report%20on%20Demolitions%20and%20Seizures%20in%20the%20West%20Bank%20including%20East%20Jerusalem%20-%201%20January%20%2031%20December%202023.pdf. See also the data on demolition and displacement in the West Bank produced by the UN Office for the Coordination of Humanitarian Affairs, available at https://www.ochaopt.org/data/demolition, showing a significant increase in demolitions as between 2023 and 2024.

[529] UN High Commissioner for Human Rights, A/HRC/58/73: Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan, 6 March 2025, available at https://www.un.org/unispal/document/a-hrc-58-73-israeli-settlements-opt-ohchr-report-march2025/.

[530] See also Alayyan 1, §§72-120 **[SB/C/17/284-302]**.

390. Each of the above matters was a mandatory relevant consideration under the SELC[531] and was in any event so obviously material to the decision that it was irrational for the SSBT not to have taken it into account: *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC* [2020] 3 All E.R. 527 at ¶32; *R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2021] 2 All E.R. 967 ¶¶116-121). The SSBT therefore erred in failing to have regard to them (an approach which he appears to have taken on the basis of a misdirection that the decision was an unfettered exercise of political discretion).

391. Further, the SSBT subsequently recognised that, in light of the position in relation to the oPT generally and particularly the oPT Second Advisory Opinion, an expansion of the suspension to *"items which Israel uses to maintain its occupation"* may be compelled by his legal obligations.[532] That the SSBT failed to consider such matters at the time of the September Decision was an unlawful failure to have regard to an obviously material consideration.

392. As to the SSBT's submission that he should be able to rely on s.31(2A) or (3C) of the Senior Courts Act 1981 (ADGR §139 [CB/A/3/179]):

392.1. Not only is that submission especially conjectural in the context of Ground 13, it has no merit in circumstances where the SSBT has confirmed in his submissions and in post-decision material disclosed to the Claimant that the very matters that the Claimant contends ought to have been taken into account *are* now being taken into account: see ADGR ¶135 [CB/A/3/178]; ECJU Ministerial Submission of 2 October 2024, ¶9 [SB/H/191/3060]. It is not possible to conclude that the s.31(2A)/(3C) is met in these circumstances.

392.2. Further and in any event, the SSBT faces a fundamental difficulty in seeking to make a no-difference argument in circumstances where (i) the Court ruled against the Claimant on the question of linkage between the various methodological challenges advanced in the earlier version of the Claimant's grounds on the basis of the SSBT's position that no change in methodology would have affected the outcome of the

[531] In particular SELC 1, 2(b)-(c), 4(b), 6(b).
[532] See the Ministerial Submission from ECJU to the Foreign Secretary of 2 October 2024: *"…the implications of the ICJ's Advisory Opinion on the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem… may be particularly relevant for Criterion 1 (UK's international obligations)… this could require us to cease export licences for items which Israel uses to maintain its occupation"*: §9 [SB/H/191/3060].

September Decision and (ii) the SSBT has subsequently amended his DGRs to omit those parts of his case that made those averments. He cannot succeed in any such argument in circumstances where relevant considerations identified by the Claimant to which the Defendant failed to have regard included the nature, scale, gravity and pervasiveness of IHL violations by Israel which the Defendant had found to be possible in relation to detainees and the provision of humanitarian assistance, in particular their legal characterisation, e.g., as war crimes and crimes against humanity: see ASFG/280(a)(i). Those considerations could only have been identified following a proper risk calibration exercise. The Defendant has failed to undertake such calibration, and in the context of considering that hypothetical for the reasons given in the context of Ground 12 cannot properly proceed on the basis that the Defendant's existing methodology was lawful. There is no proper basis for concluding that the Defendant's decision on whether to send a "political signal" would have been the same following a calibration exercise conducted using a lawful methodology, the results of which would have been taken account alongside the other factors identified at ASFG/280. It would be unfair for the SSBT to now seek to rely on that same methodology that he assured the Court and the Claimant did not need to be attacked because it could not have affected the outcome of the September Decision.

XII. CONCLUSION

393. For the reasons given above, the F-35 Carve Out was unlawful. So too was the SSBT's decision not to suspend all licenses for use by the Israeli army. The Claimant seeks declarations to that effect. It also seeks an order quashing the F-35 Carve Out, and an order requiring the SSBT to review his decision not to suspend other licenses to Israel.

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